THE

MONTHLY LAW REPORTER.

MARCH, 1858.

FIXTURES.

We know of no branch of our jurisprudence so deficient in scientific method, as the law of fixtures. It is an inextricable labyrinth, to which every new decision seems only to add a new maze. If we should collect together the trumpery scattered through the books, along the line between real and personal property, — the cider mills, the Dutch barns, the machinery and running gear of all kinds of mills and factories, the salt-pans, the pier glasses, &c.,— if we should collect all this rubbish and jumble it together in a promiscuous heap, we should have before us a very appropriate symbol of the mass of conflicting decisions upon this branch of the law.

The old Common Law was made for the benefit of the feudal barons, the landed proprietors, and not for their tenants. Hence, the rule, by which everything personal was converted into real property, the moment it was annexed to the freehold, no matter what might have been the rights or intentions of the party who put it there. The revival of commerce, after the dark ages, and the growing wealth and power of the mercantile community, led to the relaxation of the original rule of the Common Law. "The old cases upon this subject," said Lord Kenyon, in *Penton* v. *Robart*, 2 East, 90, "leant to consider as realty, whatever was annexed to the freehold by the occupier; but in modern times, the leaning has always been the other way, in favor of the tenant, in support of the interests of trade, which is become the pillar of the state."

The case of *Elwes* v. *Maw*, 3 East, 38, is generally regarded as the leading case on this subject. It was decided by Lord Ellenborough, in 1802. It marks the point at which the progress of judicial innovation upon the Common Law had arrived at that time. It was a case between landlord and tenant. The tenant erected upon the demised premises, at his own expense, a beast house, a carpenter's shop, a wagon house, a fuel house, a pigeon house, &c. &c. They were of brick and mortar, and the foundations were let into the ground. The tenant, previous to the expiration of the lease, pulled down these erections, dug up the foundations, and carried away the materials, leaving the premises in the same state as when he entered upon them. It was decided that these erections did not fall within the exception in reference to trade fixtures, that they became part of the realty, and that the tenant committed waste in removing them.

These cases of *Penton* v. *Robart*, and *Elwes* v. *Maw*, are sufficient to show, that the power which the tenant enjoyed of removing fixtures erected for the purposes of trade, was not exercised by him under the protection of the courts, by virtue of the natural and obvious right which every tenant has, of taking away whatever he puts upon the demised premises, provided he leaves them in no worse state than he found them; but this power was accorded to him as a special privilege by the courts, on the ground of public policy, "in support of the interests of trade, which is become the pillar of the state." An artificial and odious distinction was thus created between the interests of commerce and agriculture; between those who till the soil and those who exchange its products. The exception was afterwards extended to things affixed to the freehold for manufacturing purposes, for ornament, and for domestic and other uses, until finally the law of fixtures presents itself to the student, as a curious piece of judicial patchwork, stitched together, and lapped on from time to time as occasion required, so as to hide the defects of the Common Law.

We have no time or space to notice the multitude of cases on this subject. The question is, where is the clue that is to help us out of this labyrinth of inconsistent decisions. We suggest that it may be found in the Civil Law. To be sure, the superficial student might be disposed to insist that there is no material difference, as to fixtures, between the Common and the Civil Law; and he would cite you such maxims as the following: "*Solo cedit, quod*

solo inædificatur:" "*Solo cedit, quod solo implantatur.*" But there is one single principle which pervades all the learning of the civilians on this subject, and which they always take for a guide in determining whether any article in dispute is real or personal property. With them the question is simply: What was the intention of its owner, in placing it where it is? Was it placed there permanently, *perpetui usus causa*, as an accessory to the freehold, or was it placed there temporarily, with the intention of removing it? The fact and mode of annexation, the relation of the parties to each other and to the article in question, the nature and use of the article, — such considerations do not present themselves to the civilian as arbitrary and inflexible rules. With him they occupy a subordinate place. He takes them into his service, as so many helps and aids, by which to determine what with him is always the ultimate object of inquiry, viz. the honest intention of the party who owned it, that it should become a part of the realty, or continue personal property. That this is the doctrine of the civilians might easily be shown from citations from the *Corpus Juris Civilis*, the writings of such men as Voetius and Merlin, and the French *Code Civil* and its commentators.

There are also several English and American cases, in which considerable prominence is given to the intention of the owner. See *Lawton* v. *Salmon*, 1 H. Bl. 259, *note*. This was an action by an executor against the tenant of the heir at law of the testator, to recover certain vessels used in salt works called salt-pans. We copy the following from the opinion of Lord Mansfield:

"The salt spring is a valuable inheritance, but no profit arises from it unless there is a salt work, which consists of a building, &c. for the purpose of containing the pans, &c., which are fixed to the ground. The inheritance cannot be enjoyed without them. They are accessories, necessary to the employment and use of the principal. The owner erected them for the benefit of the inheritance; he could never mean to give them to the executor. . . . . On the reason of the thing, therefore, and the intention of the testator, they must go to the heir. It would have been a different question, if the springs had been let, and the tenant had been at the expense of erecting these salt works; he might very well have said, 'I leave the estate no worse than I found it.'"

Nowhere does the sound common sense of the great English civilian appear more conspicuously than in this extract. His reasoning is approved and adopted by the court, in *Taylor* v. *Townsend*, 8 Mass. 411. See also

Buckland v. *Butterfield*, 2 Brod. & Bing. 56; *Empson* v. *Soden*, 4 Barn. & Ad. 657, and *Winslow* v. *The Merchants' Insurance Company*, 4 Met. 306.

The distinction in the English cases, between agricultural erections and those for purposes of trade, is repudiated by Judge Story, in *Van Ness* v. *Pacard*, 2 Peters, 137, by Judge Spencer, in *Holmes* v. *Tremper*, 20 John. 29, and by Judge Harris, in *King* v. *Wilcomb*, 7 Barb. S. C. R. 263, and *Dubois* v. *Kelley*, 10 Ibid. 496. See also *Whiting* v. *Brastow*, 4 Pick. 310.

There are other cases, still more recent, which indicate a very decided inclination of the current of judicial decision as regards fixtures, especially in this country, towards the doctrine of the Civil Law. We refer more particularly to the cases of *Teaff* v. *Hewitt*, 1 McCook's Ohio Reports, 511, and *Snedeker* v. *Warring*, 2 Kernan, N. Y. Rep. 170. In the first of these cases, Chief Justice Bartley presents us with an elaborate and able review of the whole subject, twenty-five pages in length. He defines a fixture to be "an article which was a chattel, but which, by being physically annexed or affixed to the realty, became accessory to it and part and parcel of it." He comes to the conclusion that the united application of the following requisites will be found the safest criterion of a fixture:

1st. Actual annexation to the realty, or something appurtenant thereto.

2d. Appropriation to the use or purpose of that part of the realty with which it is connected.

3d. The intention of the party making the annexation, to make the article a permanent accession to the freehold, — this intention being inferred from the *nature* of the article affixed, the *relation* and *situation* of *the party* making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made.

The third of these requisites, it will be seen, is the same as the criterion of the Civil Law. But the mere fact of physical annexation is not with the civilians, as with Judge Bartley, a controlling point. The fact itself, as well as the mode of annexation, are simply data from which the intention is to be inferred.

The question naturally arises, how are we to determine whether or not a thing is a fixture, which satisfies one of these requisites, but not all. Judge Bartley would exclude it, on the ground that it does not stand the test of their "united application." But this rule will not hold good in all cases. The statue in the case of *Snedeker* v. *Warring*,

as we shall soon see, answered the third requisite, but not the first. Nor did it come under the head of such articles as title-deeds, keys, heir-looms, &c., which Judge Bartley, in order to save his rule from exception, insists are not fixtures, "but mere incidents to the freehold, and pass with it, upon a different principle from that of a fixture." And yet this statue was very properly decided to be part of the realty, notwithstanding the absence of the first requisite. It follows that in actual practice, the third requisite must necessarily govern and control the first. In reference to the second, it is sufficient to say, that it is covered by the third. If, therefore, Judge Bartley had gone one step farther in the process of generalization, if he had pruned off the first and second requisites of his rule, and let them take their proper place under the third, as items of evidence by which to ascertain the intention, he would have perfected the analysis, and found himself planted fairly and squarely on the ground of the Civil Law.

The case of *Snedeker* v. *Warring*, presented a very interesting and difficult problem for solution. The article in question was a colossal statue, erected on a mound in front of a dwelling-house, by the owner of the premises. The action was brought by the purchaser of the statue, as personal property at a sheriff's sale, against the purchaser of the premises under a mortgage foreclosure. No decision in reference to a statue was to be found in the whole body of English and American law. So far, however, as the authorities had any bearing upon the subject, they characterized the statue as personal property. For in the first place it was not annexed to the realty, but only rested upon it by its own weight; and, secondly, it was a mere matter of ornament. On the other hand, its size, material, position, and all the attendant circumstances of its erection, indicated beyond a doubt that it was meant to be a part of the realty, just as much as the mansion behind it, and so it was finally decided. The theory of the civilians finally prevailed with the court. The opinion is given by Judge Parker, in his usually clear and elegant style. It displays a familiarity with the Civil Law, well worthy of emulation. It most effectually explodes the doctrine, that the fact of physical annexation to the soil makes the difference between real and personal property. We need more such decisions to lighten up and straighten out the dark and crooked paths of our English and American jurisprudence.

E. F. H.

Circuit Court of the United States. Maine District. April Term, 1857.

JOHN DEMERITT *v.* THE PRESIDENT, DIRECTORS AND CORPORATION OF THE EXCHANGE BANK.

By the act of 1855, ch. 164, it is provided that no action shall be maintained against a bank after the appointment of receivers thereof, and the remedy of creditors whose claims are disallowed, is before the supreme court of the State.

Held, that said act can have no effect to defeat the right of action of a citizen of another State, in the circuit court of the United States.

A State law cannot discharge or suspend the obligation of a contract, though made and to be performed within the State, if it is a contract with a citizen of another State.

Scribner v. *Fisher*, 2 Gray, 43, dissented from.

CURTIS, J. — The only question I can consider on this motion of the plaintiff for a judgment on the agreed statement of facts is, whether that judgment ought to be entered. The consequences of that judgment, and the means by which it may lawfully be satisfied, are matters to be decided hereafter, upon proceedings proper to raise those questions.

The action is founded on bills of the bank, the genuineness of which is admitted. The defence is rested on certain laws of the State of Maine, by force of which, before payment of the bills demanded, the bank was temporarily enjoined from doing any business, by an order of a justice of the supreme court of that State, preliminarily to an investigation into its condition, in order to ascertain whether a receiver should be appointed, pursuant to statutes of that State, respecting insolvent banking corporations; and after this action was commenced receivers were appointed. These statutes are relied on to defeat the action, in one or both of two ways. The first is, that by the eighth section of the one hundred and sixty-fourth chapter of the acts of the legislature of Maine for the year 1855, it is enacted: "And no action shall be maintained against any bank after the appointment of receivers thereof; but all its creditors shall have their remedy under the provisions of this bill."

That remedy is to present the claim to the receivers, and if disallowed by them to file exceptions to their report, which the law requires to be made to the supreme court of the State; and that court is thereupon to decide finally on the validity of the claim.

It is apparent, that if this law be allowed to defeat this action, a suit by a citizen of Massachusetts against citizens of Maine, brought pursuant to the constitution and laws of the United States, in a circuit court of the United States, cannot be tried and determined in such circuit court, but is put an end to without a trial, by force of the State law, and its subject-matter transferred for judicial cognizance to tribunals of the State.

It is clear, both upon principle and authority, that this cannot be done. *Suydam* v. *Broadnax*, 14 Pet. 67; *Union Bank of Tennessee* v. *Vaiden et al.* 18 How. 503; *Hunt* v. *Danforth*, 2 Curtis's Cir. Ct. R. 604.

It was argued that this State law furnishes one of the rules of decision, which are adopted in trials at the common law by the thirty-fourth section of the judiciary act of 1789, (1 Sts. at Large, 92.) But it is not the purpose of the State law to afford a rule for the ascertainment of any right upon a trial, but to prevent a trial of the right in the action which it requires to be discontinued, and to substitute another mode of proceeding in which the right is to be tried. It is altogether a law of procedure, and is not adopted by the thirty-fourth section.

The other ground upon which the defence was rested is, that these bills being payable in the State of Maine, it is competent for that State to discharge the bank altogether from the causes of action thereon, though the bills are payable to bearer, and held by a citizen of Massachusetts; and as the contract is thus subject to the control of the State laws, the injunction by which the bank was ordered to do no more business, rendered it unlawful for the bank to pay these bills when demanded, and so suspended the plaintiff's right of action; and consequently there was no existing and operative cause of action on these bills when this action was brought.

Without investigating minutely this train of reasoning, I consider it sufficient to say that under the Constitution of the United States, it is not competent for the State of Maine to pass any law, discharging, or suspending the right of action on a contract made with a citizen of another State, by citizens of the State of Maine, or by a corporation created by the legislature of Maine. This was settled in *Ogden* v. *Saunders*, 12 Wheat. 213. (See *Boyle* v. *Zacharie*, 6 Peters, 348.) It is urged that where the contract is to be performed in the State, it is not within the decision of the supreme court in *Ogden* v. *Saunders;*

and it has been so held by a majority of the supreme court of Massachusetts in *Scribner* v. *Fisher*, 2 Gray, 43. But I cannot concur in that opinion. I consider the settled rule to be, that a State law cannot discharge or suspend the obligation of a contract, though made and to be performed within the State, when it is a contract with a citizen of another State. Such was Mr. Justice Story's understanding (*Springer* v. *Foster*, 2 Story, 387) of the decisions of the supreme court, in which he took part. See also *Woodhull* v. *Wagner*, Bald. 300; *Donnelly* v. *Clark*, 3 Seld. 500; *Poe* v. *Duck*, 5 Md. R. 1.

The plaintiff is entitled to judgment on the agreed statement of facts.

Rowe, for the plaintiff.

Kent, for the defendant.

The Young Sam.

The party claiming a lien on a vessel for materials, under Rev. Sts. ch. 125, sec. 35, must show that the contract under which the materials were furnished, had reference to some particular vessel, for the construction or repair whereof said materials were to be used.

Whether any case can come within this statute, if the particular vessel has not been begun to be built before the sale of the materials, *quære?*

Curtis, J. — This is an appeal from a decree of the district court, dismissing a libel filed in that court to assert a lien on a vessel for the price of materials used in its construction.

The material facts which I deduce from the proofs are, that in January, 1855, the claimant contracted in writing with one Edmund Merrill, for timber for the keel, shoe, floor timbers, naval timbers, foot-hooks and risers, sufficient for a ship of about 900 tons, and agreed to pay therefor by conveying to Merrill in fee a certain ship-yard and the buildings thereon. To enable himself to perform this contract, Merrill contracted with the libellant for the timber, for the price whereof the lien is claimed. This timber was put on to railroad cars by the libellant, consigned to the claimant at Portland, who obtained a delivery order from the railroad company, and directed the cars to be taken to Westbrook, and there received the timber, and used it in the construction of the vessel in question. It does not

appear that when this timber was delivered, this vessel had been begun to be built. The inference from the fact that, among the timber, were keel pieces, is, that the vessel was not then begun.

There is no evidence that the libellant and claimant ever met at all concerning the timber, save that the libellant was present when the timber was unladen, and assisted in unloading that and other timber from the railroad cars. It is not shown by the libellant that when he contracted to sell the timber to Merrill, he relied on any lien on this vessel, nor that he even knew it was intended for any particular vessel. He neither produces his book of accounts to show a charge to any vessel, nor offers any evidence of the terms of the contract between Merrill and himself. He relies solely on the facts that he was once the owner of the timber; that whatever contract he may have made with Merrill, he himself was present when the timber came into the actual possession of the claimant, and that it was used in building the vessel libelled.

The local law, (Rev. Sts. ch. 125, sec. 35,) gives to any person who shall furnish materials for or on account of any vessel, building, or standing on the stocks, or under repairs after being launched, a lien for the price of such materials.

But the materials must be furnished for or on account of some particular vessel, building, or standing on the stocks, or undergoing repairs. It has been repeatedly held in this district, and I concur in the correctness of the decision, that the parties must have reference to some particular vessel in the construction or repairs whereof the materials are to be used, and upon which the lien is to be created. *The Calisto*, Daveis' R. 29; S.C. on appeal, 1 Story's R. 244; *Sewall* v. *The Hull of a New Ship*, Ware's R. 565. I entertain great doubt whether any case can come within this law, if the particular vessel had not been begun to be built before the sale of the materials.

But it is not necessary to decide this point, because it is not shown by the libellant that his contract with Merrill had reference to any particular vessel, and I consider the burthen rests on him to prove this.

It was urged at the argument, that in case of materials furnished for a foreign vessel, the admiralty law presumes they were furnished on the credit of the vessel. But in such a case it must first appear that there was a particular vessel in the contemplation of the parties, whose necessi-

ties were to be supplied; and, according to the correct doctrine, as expounded by the supreme court at the last term, it must not only appear that the supplies were necessary for the particular vessel, but that it was also necessary that the master should have a credit to obtain them.

The liens given by the local law do not depend on the same requirements. But whatever requirements are made by the local law as prerequisites for a lien, must be shown by the libellant to have been complied with, before he can claim a preference over other creditors, or entitle himself to assert an interest in the property of a third person.

Whether one who agrees to sell materials for building or repairing a vessel, and who contracts with another for the means to enable him to comply with his agreement, can, thereby, give a lien to a sub-contractor, under this law, it is not necessary in this case to determine. As was suggested in *The Kiersage*, (2 Curtis's R. 421,) the case of a sub-contractor for labor is not necessarily the same as that of a sub-contractor for materials. I mention it here, only to exclude the conclusion that anything is intended to be decided respecting this question.

The decree of the district court is affirmed with costs.

Butler, for the appellant.

Shepley, for the claimant.

New York Court of Common Pleas.

JOURNEY AND OTHERS *v.* BRAKELY AND UTLEY.

A general assignee for the benefit of creditors does not, by the mere act of accepting the assignment, become liable on the covenants of a lease held by his assignor as lessee, without some unequivocal act of acceptance on his part. And his taking possession of the premises and holding them for a short time for the purpose of selling off the stock of goods by auction, and making such sale within a reasonable time, do not constitute such acts of acceptance.

Where such assignee held such possession of the premises for a part only of a quarter and then abandoned, and is not liable on the covenants of the lease, he is not liable as for use and occupation.

DALY, J. — The law in respect to the liability of the assignee of a lessee for rent reserved by the lease, is well settled. Where a lease of land is made upon any condition, such as the payment of rent, the condition is annexed to the land and goes with it, and the assignee of the lessee, if he accepts the assignment, takes the estate subject to the

condition, and is liable for the payment of the rent as long as he continues assignee. Thus it is said in *Walker's case*, 3 Coke, 22, 66, "If the lessee grant over all his interest, the lessor may have an action of debt against the assignee, with whom there was no contract by deed, forasmuch as the rent issues out of the land, the assignee who hath the land, and is privy in estate, is debtor in respect to the land." When the assignee accepts the assignment, the privity of estate which existed between lessor and lessee is gone, and a privity of estate arises between the lessor and the assignee. *Copeland* v. *Stephens*, 1 Barn. & Ald. 578. A privity of estate is created by the demise between the lessor and lessee, that is, a mutuality of obligation and interest in connection with the estate, and though lessor and lessee should both assign, this privity continues between their respective assignees, as privity of estate always exists as long as the term continues between the party who has the right to enjoy the estate and the one entitled to the rent, or to the performance of the conditions upon which it is to be enjoyed. In virtue of this privity, the assignee was always chargeable in an action of debt, at the suit of the lessor, for the rent which became due while the privity of estate between them continued. Litt. § 460, 461; *Barker* v. *Dormer*, 1 Show. 187; 3 Mod. 337; *Glover* v. *Cope*, 4 Id. 80; *Thursby* v. *Plant*, 1 Wm. Saund. 241 *a*, and note 5; Comyn, Land. and Ten. 400; Archbold, Land. and Ten. 70; or if the demise was by deed, and it contained a covenant by the lessee to pay the rent, the lessor might, by the statute of 32 Henry VIII., c. 34, sue the assignee of the lessee, upon the covenant, as it is a covenant running with the land. *Brett* v. *Cumberland*, Cro. Jac. 521; *Parker* v. *Webb*, 3 Salk. 5; *Palmer* v. *Edwards*, Doug. 187, *note*; *Walker* v. *Reeves*, Id. 461, *note*; *Webb* v. *Russell*, 3 T. R. 400; *Walton* v. *Cearley*, 14 Wend. 64. With us the distinction between debt and covenant no longer exists, but the ground of action is the general liability of the assignee if he accepts the assignment, and it is immaterial whether he enters upon the land or not. *Baker* v. *Gostling*, 4 Moore & Scott, 539. If the assignment is made to him, for a conveyance can be forced upon no man, his liability is fixed, and continues as long as the term or estate remains in him. This liability is at an end when he assigns to another, even though he assign to an irresponsible person, for the express purpose of getting rid of his liability, as was the case in *Lakeux* v. *Nash*, 2 Str. 1221; but as long as he stands in the legal relation of

assignee, the estate is in him, and he is bound to the lessor for the payment of rent, falling due after he becomes assignee, or which may become due while he stands in that relation. *Taylor* v. *Shum*, 1 Bos. & Pul. 21; *Paul* v. *Nurse*, 8 Barn. & Cres. 486; *Armstrong* v. *Wheeler*, 9 Cow. 90; *Hannen* v. *Ewalt*, 18 Penn. 9; *Graves* v. *Porter*, 11 Barb. 592.

But there is a distinction between an express or specific assignment by a lessee, of all his interest in a lease and a general assignment, made by him of all his property for the benefit of creditors. In the first case, the assignee by accepting the lease, creates a privity of estate between himself and the lessor; having established that relation, it is immaterial whether he enjoys the land or not; but in a general assignment for the benefit of creditors, the assignees may accept the assignment and enter upon the execution of the trust; but whether they will become assignees of a lease, held by the insolvent at the time of the assignment, is altogether at their election, and that election must be signified by some unequivocal act. It must be an act denoting an intention on their part, to avail and possess themselves of the beneficial interest which the insolvent lessee had in the lease. Where a lease is expressly or specifically assigned, the assignee by accepting the assignment, indicates his intention to accept the leasehold estate, with all the conditions to which it is subject. But in an assignment for the benefit of creditors, nothing more is indicated but the acceptance of a trust, to execute which, it may or may not be necessary for the assignee to possess himself of a leasehold interest, existing in the insolvent assignor. The object of a general assignment for the benefit of creditors, is to transfer to the assignee all the property of the insolvent, which may be available for the payment of his debts, and a term of years in land, burdened with the payment of rents or the performance of other conditions, may be an interest of no value that would yield nothing for the purpose of the trust. To take it, and assume all the liabilities incident to its possession, might be to impose a charge upon the assigned estate, which, instead of being a benefit, might diminish the amount to which the creditors would otherwise be entitled. It is not to be presumed, therefore, that an assignee for the benefit of creditors, takes in his representative character property of this description, and charges himself on the assigned estate with all the conditions attached to it, in consequence of becoming such assignee. Something more

is required. The lease must either be specifically mentioned in the assignment, or after accepting the trust, the assignee must have acted in such a way in respect to the leasehold premises, as to show that he has elected to take the interest which the insolvent lessee had in them. This distinction between the liability of a specific assignee of a lease, and an assignee for the benefit of creditors, appears to have been first pointed out by Lord Kenyon, in *Bourdillon* v. *Dalton*, 1 Esp. 233. "The assignees," he says, "certainly take this term, under the assignment, but if it be what the civil law calls '*damnosa hereditas*,' an interest producing nothing to the bankrupt estate, they may abandon it." Afterwards, Lord Ellenborough, in *Turner* v. *Richardson*, 7 East, 335, referred to this decision of Lord Kenyon, and said, "that the assignees of a bankrupt are not bound to take property of the bankrupt, which so far from being valuable, would be a charge to the creditors, but they may make their election; if, however, they do elect to take the property, they cannot afterwards renounce it." But the point came up for more mature consideration, in *Copeland* v. *Stephens*, 1 Barn. & Ald. 594, and it was distinctly determined that the general assignment of a bankrupt's personal estate under his commission, does not vest a term of years in the assignees, unless they do some act to manifest their assent to the assignment, as it regards the term and their acceptance of the estate. These points were considered by Lord Ellenborough, in delivering the judgment of the court,—*first*, whether the interest of the bankrupt as lessee passed immediately to the assignees, defeasible upon their actual refusal to accept it. *Secondly*, whether it passed immediately defeasible upon their neglect or forbearance to do some act manifesting their acceptance; or, *thirdly*, whether its effect was suspended until their acceptance. The two first propositions were answered in the negative, and it was held that the estate remains in the bankrupt until acceptance by the assignees, subject to their right to lease the land by their acceptance of the assignment, and thereby to give effect to the deed and vest the estate in themselves. The assignment in this case was under the bankrupt and insolvent debtors' act, and the assignees, like receivers, were officers of the court; but it was held in *Carter* v. *Warne*, 4 Car. & Pay. 191, and in *Pratt* v. *Levan*, 1 Miles, (Penn.) 358, that there is no difference in this respect, between assignees under a voluntary assignment by a debtor, and assignees

or trustees appointed under insolvent or bankrupt acts. The doctrine of *Copeland* v. *Stephens*, and the law as above laid down, has been recognized in numerous cases, and may now be regarded as firmly established. *Thomas* v. *Pemberton*, 7 Taunt. 206; *Hastings* v. *Wilson*, 1 Holt, 290; *Page* v. *Godden*, 2 Starkie, 309; *Hill* v. *Dobie*, 8 Taunt. 325; *Lindsay* v. *Limbert*, 2 Car. & Pay. 526; 12 Moore, 209; *Carter* v. *Warne*, 4 Car. & Pay. 191; *Clark* v. *Hume*, Ry. & Mood. 207; *Martin* v. *Black*, 9 Paige, 641; *Carter* v. *Hammett*, 12 Barb. 253; *Pratt* v. *Levan*, 1 Miles, 358.

The same principle in effect has been recognized in the case of executors. Where they have no assets, they are not liable to the lessor, though they have taken possession of leasehold premises for the purpose of letting them, if the possession has been productive of no profit, and they have, after keeping them a reasonable time for that purpose, offered to surrender them to the lessor. *Remnant* v. *Brembridge*, 8 Taunt. 191; *Wilkinson* v. *Cawood*, 3 Anst. 909; *Reid* v. *Lord Tenterden*, 4 Tyr. 118, 120; 2 Wms. on Executors, 1493; and has also been recognized in the case of receivers, *Martin* v. *Black*, 9 Paige, 64. In *Carter* v. *Warne*, *supra*, and *Lindsay* v. *Limbert*, *supra*, it was held, that the assignees have a reasonable time to ascertain if the lease can be made available for the benefit of creditors or not, and during that time may take such steps as they may think necessary for the purpose of trying to make the property productive. They may offer the premises for sale. *Hastings* v. *Wilson*, *supra*, and *Turner* v. *Richardson*, *supra*, or put an agent in possession for the purpose of letting them, *Lindsay* v. *Limbert*, *supra;* or they may go themselves, or place persons temporarily upon the premises, to take charge of the goods of the insolvent and dispose of them there. *How* v. *Kennet*, 3 Ad. & E. 659, and may even release an under tenant, if within a reasonable time they notify the lessor that they do not intend to accept. *Hill* v. *Dobie*, *supra*, without assigning the character of assignees, or charging themselves or the assigned estate with the payment of rent.

But assuming the management of a farm (*Thomas* v. *Pemberton*, *supra*), or selling the leasehold interest at auction, and receiving a deposit on the sale, and then neglecting to enforce the contract against the purchaser (*Hastings* v. *Wilson*, *supra*), or executing an assignment of the lease to another (*Page* v. *Godden*, *supra*), or entering for the purpose of disposing of the insolvent's effects, and so using or

occupying the premises as to diminish their value, and dealing with the premises as if they were their own (*Carter* v. *Warne*, *supra*), or carrying on the trade of the insolvent the same as before, for the benefit of creditors (*Clark* v. *Hume*), have been held to be acts showing an election to take the term and assume the legal relation of assignees of the lease.

I should not have felt it necessary to go so minutely into the examination of this question upon the authorities, but for a recent decision of the Superior Court (*Muir* v. *Glinsman*, January General Term, 1856), in which an assignee for the benefit of creditors, who went into possession of leasehold premises of the insolvent, towards the end of a quarter, and remained in possession for a few days after it terminated, was held responsible to the lessor, as assignee of the lease for the whole quarter's rent. That case differed from the present in two respects. The assignee there was in possession when the quarter's rent fell due, which was not the case here, and the action there appears to have been an equitable action for a decree, that the assignee pay the quarter's rent out of funds of the insolvent, adjudged to be in his hands, whereas no such judgment was given here, nor had the Marine Court power to render such a judgment. It may have been, moreover, that there were facts in that case showing an election on the part of the assignee to accept the lease, or by the nature of the trust created, the assignee may have been chargeable in equity for neglecting to apply assets in his hands to the payment of the rent. But in the opinion of the court, which was delivered by Mr. Justice Hoffman, the decision was not put upon any such ground; but the liability of the defendant was deduced from the fact that he was an assignee for the benefit of creditors. He was held by virtue of that relation to be in privity of estate with the lessor, and his neglect to pay the rent was treated as a breach of the covenants contained in the lease. The distinction between an express or specific assignee of a lease and an assignee for the benefit of creditors, is not noticed, nor the numerous authorities establishing that distinction referred to or considered. It is obvious that Mr. Justice Hoffman did not consider that there was any difference, as all the cases referred to by him, with one exception (*Morris* v. *Parker*, 9 Ashmead, 187), in which this question was not before the court or passed upon, are all cases relating to express or specific assignment of leases, disconnected with

any trust or other obligation on the part of the assignee, except that derived from the acceptance of a direct assignment of a lease. If I understand this case as determining that an assignee for the benefit of creditors is, by merely becoming such assignee in privity of estate with the lessor of the insolvent lessee, and chargeable with the performance of all covenants contained in the lease, while he continues such assignee, then, with all possible respect for the eminent tribunal by which that judgment was rendered, I am constrained to say, that it is in conflict with the uniform course of judicial decision in this country and in England. Such would certainly seem to be the opinion of Mr. Justice Hoffman, and if the court agreed with him, I cannot concur in the correctness of the judgment. In the case before us, the assignment of the defendant was made on the 18th of August, 1854, and on the evening of that day, the keys of the store occupied by the insolvent were delivered to the assignees. Immediately after, they took an inventory; the goods were got ready for auction, they dismissed the salesman, but continued to sell goods as customers came in, and a notice was posted up on the outside of the building, "selling off by order of the assigness." On the 8th of September, a portion of the goods were sent to auction. On the 9th of September, an injunction was served upon the defendants, restraining them from selling the goods, which was dissolved on the 19th, and the day following the residue of the goods were sent to auction, and on the 23d, before the quarter's rent was due by the lease, the defendants vacated the premises. Soon after the assignment, and before the injunction, one of the defendants told one of the plaintiffs, that they did not intend to take the building, and would have nothing to do with the lease; that they would occupy the building no longer than they could help; would get the goods right out, and close the business as soon as possible; and before the quarter ended, one of the plaintiffs told one of the under tenants not to pay rent to Thompson and Ruesler, the insolvent assignors, and the plaintiffs' collected the quarter's rent when it fell due on the 1st of November, from two of the under tenants, and entered into an agreement in writing with each of them, to keep them in peaceable occupation until the first of May following, upon their paying their rent to the plaintiffs, and also to save them harmless against any one claiming rent from them.

There is nothing in the state of facts to show an election

on the part of the defendants to become assignees of the lease. In *Hill* v. *Dobie*, *supra*, the assignees did much more to signify their acceptance of the lease. They released an under tenant from all liability under it, before notifying the lessors of their intention not to accept. It was contended that by so doing, they had exercised dominion over the property; but having notified the lessors, within a reasonable time, that is, a month after the assignment, that they did not accept, it was held that they were not liable as assignees. In *Wheeler* v. *Bramah*, 3 Camp. 340, the assignees left the bankrupt effects upon the premises nearly a year, and for the purpose of preventing a distress, they paid the rent in arrear for three quarters, when it was agreed between them and the landlord that the lease should be put up at auction, to see if it was worth anything, the assignees declaring that, otherwise, it was not their intention to take the premises. The bankrupt's effects were sold at auction upon the premises, and at the same time the lease was put up, but there were no bidders, and it was held that the defendants had not made themselves assignees of the term. In *How* v. *Kennet*, *supra*, the assignees put in a shopman, who carried on the business, accounting to them for a week, when the shop was shut, though the man slept at the house for the purpose of taking care of the goods for five or six weeks, when the property remaining on the premises was sold at auction by the order of the assignees, and it was held that the entry of the assignees was merely for the purpose of selling the insolvent's goods, and was not such a possession as would constitute a tenancy, and render them liable to the landlord in an action for use and occupation.

Pratt v. *Levan*, *supra*, was a case more nearly resembling the one under consideration. There the assignees, under a voluntary assignment for the benefit of creditors, containing no notice of the lease, took possession of the goods in a store, which, as in this case, was part of the demised premises, the key of which they took. They took an inventory of the goods, and eleven days after the assignment, when the quarter was more than half expired, they made a public sale of the goods upon the premises. About a month after, on the day when the quarter's rent fell due, they paid the rent of that quarter to the lessor and tendered him the key, which he refused to accept. He brought an action against them for the rent subsequently accruing, but the defendants had judgment,

the court being of the opinion that they were not liable as assignees of the lease. The delivery of the key was regarded as a mere symbol of the possession and a giving up the control of the goods in the store only. The court said, that the taking of the inventory and the further sale of the goods on the premises, was not an entering into the premises demised, so as to bind the defendants as assignees of the lease, and that as the payment of the quarter's rent was accompanied with a tender of the key, and a statement on the part of the assignees that they had made no other use of the premises than to make a public sale of the goods, it could not be deemed as an implied election to take the lease under the assignment, nor could the assignees in any way be held responsible for any rent which accrued subsequently.

Upon these authorities, I think it is very clear that the defendants did nothing to show that it was their intention to become assignees of the lease. Their entry upon the premises was for the temporary purpose of disposing of the insolvent effects, and they did so in an expeditious and summary manner. They notified the plaintiffs within twenty days after the assignment, that they would have nothing to do with the lease, and informed them for what purposes they had gone upon the premises, and that the plaintiffs did not regard or trust them as assignees of the lease, or as having succeeded to the rights and interest of the lessees, is evident from their notifying the under tenants not to pay rent to the lessees, collecting rent from the under tenants, and entering into the agreement to save them harmless. I can see nothing in the defendants' acts to charge them as assignees of the lease, or to make them responsible for the performance of the covenants contained in it. It has been held that when one, not the lessee, is in possession of leasehold premises, it will be presumed that he is in as assignee of the original tenant. *Durando* v. *Wyman*, 2 Sand. S. C. 598. If the defendants could be regarded as in possession at all, which I very much doubt, as the lessees continued in the store as long as the defendants were there, assisting in getting the goods ready for auction, this presumption, like every other, would be overcome when it was shown for what purpose they went into possession. It was held, in *Williams* v. *Woodward*, 2 Wend. 487, that the party in possession may overcome the legal presumption by showing that he is not assignee, and the rule is thus carefully stated in *Acker* v. *Witherell*, 4 Hill, 112,

where a man is shown to be in possession of leasehold premises, *without anything more*, the presumption of law will be that he is in as assignee of the original tenant.

In the present case, the judgment was given for the time that the defendants were adjudged to be in actual occupation; that is, from the 18th of August to the 23d of Sept., at the rate of the rent reserved by the lease, and it remains but to consider whether, if the defendants were not assignees of the lease, they were liable to the plaintiffs for use and occupation for the time they were adjudged to be in possession of the store.

I confess I do not see how it is possible for the plaintiffs to sustain an action against the defendants for use and occupation, if they were not assignees of the lease; then, according to the ruling (*Copeland* v. *Stephens*, 1 Barn. & Ald. *supra*), the leasehold estate remained in Thompson and Ruesler, the insolvent lessees. The privity of estate had never been changed. Thompson and Ruesler were in legal possession under a valid subsisting lease, whether they were in actual occupancy or not being immaterial, though in my judgment they were quite as much so as the defendants. If the defendants occupied, they could only do so rightfully by the permission of and authority of the lessees. The lessors could give them no such authority. They had reserved the right by the lease, to enter and relet as the agent of the lessees if the premises should become vacant during the term, but they did not become vacant until the 23d of September, when both the lessees and the defendants left the store. The action for use and occupation, whether in debt or in assumpsit, is maintainable only when there is a contract between the parties, express or implied. *Birch* v. *Wright*, 1 T. R. 378. "An implied contract," in the language of Lord Denman, in *Gibson* v. *Kirk*, 1 Ad. & El. N. S. 850, "is raised by law from the fact that land belonging to the plaintiff, has been occupied by the defendant with the plaintiff's permission." The plaintiffs here could enter into no contract with the defendants for the occupation of the premises, and therefore no such contract could be implied. It is essential in any action for use and occupation, that the relation of landlord and tenant shall exist. *McKeon* v. *Whitney*, 3 Denio, 455. If the defendants had become the assignees of the lease, that relation would exist between them and the plaintiff, (Arch. Land. & Ten. 69), while the term still existed in the lessees, Thompson and Ruesler. There is an end to all

presumption of an implied contract between the actual occupant and the owner, or of the relation between those of landlord and tenant, the moment a lease of the premises from the owner to a third party is shown to be outstanding. Unless the actual occupant is the assignee under that lease, or can be presumed to be, there is no privity, either of estate or of contract, to support an action against him by the owner for rent. The general term of the court below was right in holding that this judgment could not be sustained, but they erred in giving judgment for the defendant. They should have reversed the judgment and ordered a new trial, for the plaintiff might show upon a new trial acts of the defendants amounting to an acceptance of the lease; on the trial, he was not required to go any further, as the court gave him judgment upon the case made out. The case must go back to the general term that they may give the proper judgment.

Superior Court of Suffolk County. March Term, 1857.

[Reported by L. H. Boutell, Esq.]

John Stuart, Adm'r. *v.* Wm. Blood.

In a suit upon a judgment rendered in favor of the plaintiff's intestate, in an action of tort, the defendant may file in set-off a judgment rendered in his own favor, in an action of contract, against the plaintiff's intestate and another person now living.

Abbtot, J. — This was an action of contract upon a judgment rendered in favor of the plaintiff's intestate, and the defendant files in set-off a declaration upon a judgment rendered in his own favor against the plaintiff's intestate and another person now living, and the parties in their statement of facts agree, that both judgments are in full force and in no part satisfied, and that the plaintiff's judgment was rendered in an action of tort, and the defendant's in an action of contract. The only question submitted to the court is, whether upon these facts the set-off can be allowed.

The first objection is, that the set-off cannot be allowed because the plaintiff's judgment was rendered in an action of tort, and the defendant's in an action of contract. But very clearly this cannot be sustained. The decisive answer

to it, is, that the original tort was merged in the judgment, and that now the plaintiff sues on that judgment, a contract of the highest character, and not upon the unliquidated claim for damages arising from the tort; that suit has been passed upon, and the judgment in question is the result of it. The action now before us is certainly an action of contract, and must be governed by the rules applicable to that class of cases.

The next objection is, that the demand claimed to be set off is not between the same parties as the plaintiff's demand, and not embraced within that provision of the Revised Statutes, ch. 96, sec. 1, describing the mutual demands between plaintiff and defendant, which may be set off. On a careful examination of the provisions of the law regulating the subject, it is quite clear that the allowance of the set-off in this case is not expressly prohibited; the only question remaining is, whether its allowance is fairly within the reasonable construction of the several enactments on that subject. We think it is. The judgment in question is a demand against the plaintiff's intestate, for the whole of which he was liable, and which may now be wholly collected out of his estate, leaving the matter of contribution to be settled between the two judgment debtors. Why then should not the defendant avail himself of this method of appropriating the intestate's assets to the payment of his demand? Generally, by the trustee process, the defendant would be able to attach a debt due from any other person to either of his judgment debtors, why then should there be a difference, when the debt happens to be due from himself instead of a third person? There clearly is no reason upon principle against allowing the set-off, and we think there is none to be gathered from the express provisions of the statutes.

It is a demand due from the plaintiff's intestate to the defendant, the whole of it, and the full amount could be collected of his estate, although the same liability exists on the part of another, the defendant can enforce it against either, at his election, and by filing it in set-off in this suit, he makes his election to collect it of the plaintiff just as effectually as he would do by levying an execution for the whole on the plaintiff's estate. Besides, the technical objection that a suit on a judgment against two must be against both judgment debtors, their liability being joint, no longer exists. Upon the death of the plaintiff's intestate, the remedy against the two, upon the judgment, must

necessarily be several, as the living judgment debtor could not be joined with the administrator of his co-debtor, but each must be sued separately.

We are not aware that this precise question has before arisen under our statutes, but we think the principles applicable to it have been settled in the case of *Donelson* v. *Colerain*, 4 Met. R. 432; and here the court held, that upon a suit against the defendants, a town, they might set off a claim upon a bond given thereon by the plaintiff as collector of taxes, with several sureties, upon the ground, that the defendants had the right to enforce that claim in full against either obligor in the bond, and that filing it in set-off against one, was only one method of so doing. It is true, in that case, the bond was several as well as joint, but it is difficult to see how that fact could vary the principle applicable. Upon the whole, we are all of opinion that the set-off should be allowed.

[Reported by L. H. Boutell, Esq.]

Hickok *v.* McKay.

Defendant made the following writing: — "I agree to credit A. on an account which I have against him, the sum of $ 1060, for which I have obtained of B. an indorsement on my note for the above amount." B. cannot maintain an action on it against the defendant, because it is not a contract with B., because it is a receipt and not a contract, and because, if defendant does not credit A. the sum mentioned, the consideration for the indorsement has failed, and B. can recover of defendant the entire amount of his note.

Abbott, J. — This is an action of contract, in which the plaintiff alleges that the defendant made a certain written agreement with him, of which the following is a copy: "Boston, Nov. 13, 1849. This may certify that I agree to credit Mr. John Ayres, on an account which I have against him, the sum of one thousand and sixty dollars, for which I have obtained of Mr. Gideon Hickok (the plaintiff) an indorsement on my note, for the above amount," signed by "McKay, the defendant," and that the said defendant did not credit said sum to Ayres, and therefore owes the plaintiff that sum. There is also another count for another sum, setting forth an agreement almost precisely like the one above given, except in amount. The only

question raised, is, whether the action can be maintained in the name of the present plaintiff. The claim on the part of the defendant being that the action, if any has accrued, must be brought by Ayres; while on the contrary, the plaintiff contends that, although Ayres might have commenced an action, the same right also accrued to him; that in fact the defendant was liable to both.

There are, without doubt, a large class of cases where money is paid from one to another for a third person, or where one contracts with another for the benefit of a third person, in which an action can be maintained, either by the person paying the money or from whom the consideration of the contract moved, or the one to whom the money was to be paid, or for whose benefit the contract was made. Such are the cases cited by the plaintiff's counsel from our own and the English Reports, and others might be found of a like character. *Dalton, et ux.* v. *Poole*, Sir T. Raymond R. 302; *Arnold* v. *Lyman*, 17 Mass. 404; *Hall* v. *Marston*, 17 Mass. 575; *Felton* v. *Dickinson*, 10 Mass. 287. On looking at those cases, however, it will be seen that upon the face of the contract the party paying the money had a direct interest in its appropriation, and would be injured by its misapplication. As in the case of *Arnold* v. *Lyman*, where a debtor assigned the plaintiff certain property, and in consideration thereof the defendant promised the assignor that he would pay certain debts due from him. Of course under such circumstances the person to whom the promise is made, if it is not performed, can sue for the breach of it, he being as much interested in its performance, as the person to whom the debt is to be paid. But the case at bar is not at all similar to that, or the other cases cited, for various reasons.

In the first place, if there is any contract contained in the paper upon which the action is founded, it would seem very clearly to be a contract with Ayres, and not with Hickok. Let us consider its terms. "This certifies that I agree to credit Mr. John Ayres the sum, &c., on an account which I have against him." If there is any agreement at all, it is with Ayres; he is the party who is to be credited, who is to receive the benefit of the act to be done; there is no agreement or contract with Hickok to that effect; on the contrary, there is a studious avoidance of any language capable of such construction. The agreement is with Ayres, and then the paper proceeds to state the source from whence the money was obtained which

was agreed to be credited to Ayres, viz.: by an indorsement on a note held by Hickok against the defendant. All the part relating to the plaintiff is the mere narration of a past occurrence; that is, "I agree with Ayres to give him a certain credit, the amount of which I have heretofore obtained from Hickok." Here is certainly no contract with Hickok, whether there is with Ayres or not.

But we think there is a stronger objection to the plaintiff recovering on this writing as an agreement with him, and it is this. On careful examination it will be found not to be a contract or agreement, but merely a receipt, the written evidence that the defendant has received the sum named in discharge of an indebtment from Ayres to him. Here was a debt due from Ayres to the defendant, who receives a certain sum on account of it, and in part payment of that debt, and the reception of it discharges immediately the debt *pro tanto*. The fact that the money is paid by another, makes no difference, it is still paid on Ayres' debt, so received by the defendant, and so operates in law. The receipt certainly says, "I agree to credit it on Ayres' account," but that does not constitute a contract, it is still but a payment, which operates upon the debt immediately as payment, without any further act or appropriation on the part of the defendant, and which could be plead as such by Ayres the very instant the money was received by the defendant. If Ayres has, by any mistake of fact, paid the second time to the defendant this amount on his account, then he can recover back the sum last paid, that having been taken when it was not due, but not the amount evidenced by the writing in question, as that was rightfully and properly paid to, and retained by the defendant. That the words, "I agree to credit Ayres on an account I hold against him," &c., do not change a receipt, a mere evidence of payment, into a contract, is quite clear upon principle and authority.

No position is better established than that the mere payment of a subsisting debt never creates a contract between the parties to such payment, but is only a discharge of what is due, which is received because the party has a right to it, and which can never be recovered back, if the debt upon which it is paid is absolutely due and owing. It is taken under such circumstances upon no express or implied contract, that it shall in any event be paid back. So far has this principle been extended, that where one is indebted on a note, bond or account, and makes a part

payment on such indebtment, which is receipted for, and immediately after the debt is sued, and judgment recovered for the whole, without crediting the payment, the amount of it cannot be recovered back, although by paying the judgment, a portion of the debt would undoubtedly be twice paid. This principle of course does not prevent, in certain cases where a debt has been paid the second time by mistake of fact, the last payment being recovered back; because in fact where the debt has been once paid, and the amount of it is paid again, it is not the payment of a debt, that having been already discharged. *Marriot* v. *Hampton*, 7 D. & E. 269; *Loring* v. *Mansfield*, 17 Mass. 394; *Jordan* v. *Phelps*, 3 Cush. 548. Had the receipt been in this form, "This certifies that I have received of Gideon Hickok $1060, which I agree to credit him on an account which I have against him," it is very clear that no action on it could have been maintained. How is the principle applicable changed by the fact that it is a payment of Ayres' account by money or value received from a third person? In both cases, it is a payment of a subsisting indebtment, and could be availed of, and pleaded as such, from the moment the money was received.

But the argument pressed is this — you in this way, not only hold the sum thus paid, but also may recover over again the same amount of Ayres, so that to prevent gross injustice the defendant should be held to repay the plaintiff the sum received from him. Perhaps it would be a sufficient answer if it were so, to say, that is a matter to be settled between Ayres and the defendant, and is of no manner of concern to Hickok, for he certainly has paid no debt twice, the law appropriated his money as he intended it should be, and if Ayres paid a second time it is purely a matter to be looked after by the one who has paid when he was not obliged to do it. But there was another decisive objection against this form of action. The receipt states that the $1060 was paid by the plaintiff, indorsing that amount on a note he held against the defendant; now if the defendant has failed to do that act which was the sole and only consideration for such indorsement, then it would be no payment of the note to that extent, and the whole amount of the note can be recovered in an action upon it. If it is claimed, though the pleadings do not show it, that the note has been given up, the balance having been paid, still the note would remain unpaid to

the extent of the indorsement, that having been made by mistake, and on a consideration which has failed, and no such sum having been in fact paid. Under any circumstances, we do not think the action can be maintained by the plaintiff for a breach of the contract set forth in the declaration.

JONES *v.* WHITNEY.

A discharge in insolvency, obtained after a judgment, cannot be pleaded in review, although the proceedings were commenced while the action was pending.

By the Court. — THIS was a petition for review, alleging among other reasons the fact, that before the rendition of the judgment which is sought to be reviewed, the plaintiff in review had filed a petition for the benefit of the insolvent laws, and that after said judgment he had received a discharge from all his debts which were owing at the time of the petition. The review was granted for certain other reasons which were set forth, but the parties now by an agreed statement, wish to raise the point whether or not the plaintiff in review could plead his discharge in insolvency in the review. And the court are of the opinion that he cannot. The object of a writ of review is to review the original judgment as it was when rendered, and to enable the original defendant to avail himself of any then existing defence, which by accident or otherwise he did not make.

The judgment on a writ of review must be determined as the original judgment might have been. Payment, release, accord and satisfaction after a judgment, are no cause for a writ of review, although they may be for some other remedy — for instance, the writ of *audita querela.*

There is another consideration. A writ of review does not reverse a judgment like a writ of error, and remit parties to their original cause of action. If the original judgment has not been satisfied, the judgment which the plaintiff in review may obtain is set off against it, and execution issues for the balance, or if they equal each other no execution issues — they satisfy each other. Now

in the case at bar, if the plaintiff should be allowed to plead his discharge, he would obtain a judgment exactly balancing that of the defendant, who would therefore be remediless. He would have nothing with which to go into the court of insolvency, for his original claim exists no longer, and the judgment in which it has been merged is balanced, so that no execution can issue. For these reasons the court decide that the discharge cannot be pleaded.

Train and *Underwood*, for plaintiff in review.

Wakefield, for defendant in review.

JEWETT *v.* MOWER.

A party to an action is estopped to contradict the officer's return. But this estoppel is not to be extended by inference or implication to any fact not directly averred.

IN this case the defendant was described as of Boston, and the officer returned that he left the summons at the defendant's "last and usual place of abode." The defendant answered in abatement, alleging his place of abode to have been in Cambridge, in the county of Middlesex, and alleging that the officer who served the writ had no authority to make service in the county of Middlesex. The plaintiff then amended his writ, by calling the defendant of Cambridge, and demurred to the answer on the ground that the defendant was estopped to contradict the officer's return.

By the Court. — The rule which the plaintiff relies upon in his demurrer is well known. It has, however, been considered a hard one, and efforts have been made to change it, and to introduce the New Hampshire practice of allowing the summons to be enrolled for the purpose of showing what the service really was. But the attempt did not succeed, and the rule is still fixed.

Does this answer contradict the officer's return? In the case of *Guild* v. *Richardson*, 6 Pick. 364, the defendant was called in the writ, of Kentucky, and the officer returned that he had attached all his interest in a lot of land. The defendant answered in abatement that he had no interest in said land, and this answer was sustained on the ground that it was not averred that he had, and a party is not to

be estopped by implication or inference. So in the case at bar, — the officer does not aver that the defendant's place of abode was in Boston, and, therefore, he is not estopped from alleging it to have been in Cambridge. The demurrer must be overruled. But there is also in the case a motion by the plaintiff for further service under § 53, ch. 90, R. S. This motion the court think should be allowed. Answer in abatement overruled, and further service ordered.

Sewell and *Angell*, for plaintiff.

E. F. Hodges, for defendant.

Mann *v.* Hughes.

The estate of an undertenant to a tenant at will is determined by an alienation of the fee together with notice or knowledge thereof and a reasonable time in which to remove.

Reasonable time is allowed the tenant for the purpose of finding some place to which to remove his property, — not to find other premises equally adapted for his peculiar trade or business.

This was trespass *qu. cl.* for breaking and entering the plaintiff's leased premises, and was submitted to the court on an agreed statement of facts, to determine whether an action in any form could be maintained thereon.

The plaintiff was tenant at will of E. G. Hovey & Co., and occupied two rooms for the daguerreotype business and for stuffing birds. Hovey & Co. were tenants at will of Samuel Hews, who was the owner of the fee. On April 18th, 1856, Hews conveyed the estate to Hunneman. On the next day, Hunneman gave Hovey & Co. written notice of the sale and of the termination of their tenancy, and this notice was communicated to the plaintiff on April 21st. On April 23d, Hunneman gave Hovey & Co. a written notice to quit, which notice was also communicated to the plaintiff. The plaintiff could have removed his property in three days, but he could not find another room suitable for his business, though he made diligent search and inquiry. On May 2d, the defendant owning the adjacent building did, by the authority of Hunneman, break in the side of the plaintiff's room. The defendant used no more force than was necessary to make the alteration authorized by Hunneman.

By the Court. — The plaintiff is an undertenant at will to a tenant at will whose landlord has alienated. After a

sale and entry of the purchaser of real estate, a tenant holding under a parol lease is a mere tenant at sufferance, having a mere naked possession, without any right or interest whatever. *Kinsley* v. *Ames*, 2 Met. 29. And such tenant at sufferance is not entitled to notice to quit, nor can he maintain process for forcible entry. *Hildreth* v. *Conant*, 10 Met. 299; *Hollis* v. *Pool*, 3 Met. 350.

Meader v. *Stone*, 7 Met. 147, decides that a tenant at will, after expiration of notice to quit, cannot maintain trespass *quare clausum fregit* — *à fortiori*, a tenant at sufferance cannot.

But although a former tenant at will is not entitled to notice to quit after alienation, yet he is entitled to notice of the alienation before he can be put in the condition of a trespasser. *Furlong* v. *Leary*, 8 Cush. 409; *Kelly* v. *Waite*, 12 Met. 300. But actual knowledge of the alienation with reasonable time to remove, for instance, an open actual entry by the alienee would probably be held equivalent to notice.

In *Howard* v. *Merriam*, 5 Cush. 563, these cases are cited and commented upon, and the doctrine is expressly recognized that by an alienation in fee or for years the estate is *ipso facto* determined and cannot exist longer, and though it is also stated that such an estate is determined by its own limitation *without notice*, yet we think this language was intended to apply to the statute notices to quit, and not to a notice to be given to the tenant of the alienation in order to put him in the position of a trespasser.

In the case at bar the notice, or knowledge of the alienation, was by the agreed statement sufficiently brought home to the plaintiff, and he had reasonable time in which to remove. And we hold the reasonable time to be merely time to find a convenient place to which to remove his property, and not to find a place adapted to carry on his trade. We are of the opinion that no action in any form can be maintained by the plaintiff.

Judgment for defendant. Plaintiff appeals.

G. W. Searle, for plaintiff.

W. Rogers, for defendant.

Court of Claims.

Illinois Central Railroad Co. v. United States.

Abandonment of reserve — Eminent domain — Duress.

The abandonment of a reserve, which has become useless for military purposes, causes it to fall back into the general mass of public lands.

Such abandonment is made by the President, acting though the war department, and it is not necessary to its validity that the land should be formally placed at the disposal of the department of the Interior. A recital in a deed of such land, stating that the land has become useless for military purposes, made by the secretary of war, must be considered as the act of the President.

A State, by virtue of its right of eminent domain, may authorize the construction of railroads through land owned but not occupied by the United States.

The United States being in possession of the land owned by the plaintiff corporation, which was necessary to carry out the objects of their charter, it was held that a payment made to obtain possession thereof, by the plaintiffs, was made under duress and might be recovered.

Buckles v. The United States.

Post-office regulations — Fines and excuses for non-delivery of mails.

The sufficiency of excuses for failures in the delivery of the mails, is by the regulations of the department submitted to the discretion of the postmaster-general, and this court has no revisory power over decisions made in the exercise of such discretion.

Where a contract for carrying the mails is annulled for repeated failures on the part of the contractor, no extra pay is allowed. The provisions of the 317th regulation apply only to annulment for other causes.

Loranger v. United States.

Liability of government for property destroyed by enemy.

Where the government by its authorized agent takes possession of a private building and makes use of it as a military depot or barracks, and the enemy destroy the building while so used and in consequence of such use, the government is liable for its value.

The agent of army contractors is not such authorized agent of government.

KING *v.* UNITED STATES.

Patent — Estoppel.

There is nothing to estop the government from showing a patent which it has granted to have been a nullity *ab initio*, owing to the non-existence of the condition precedent of novelty of the invention.

WILLIAMS *v.* UNITED STATES.

Pensions — Certificate of disability — Acts of 1819 *and* 1832.

By the act of March 3, 1819 (3 Stat. at Large, 514), a new requisite is prescribed to the validity of pensions, namely, the biennial affidavit of continued disability to be given by two surgeons. The repeal of that act in 1832 (4 Stat. at Large, 599), was prospective only, and could not restore to the pension roll any one who had been dropped from it for con-compliance with the said condition.

CHAMBERLIN *v.* UNITED STATES.

Pensions — Statutes of limitation.

A claim for the half pay granted by the resolution of Congress of October, 1780, is barred by not being presented at the treasury by the 27th of March, 1794, according to section 1, of the act of March 27, 1792 (1 Stat. 245). It is also barred by section 1, of the act of February 12, 1793, if not presented at the treasury before May 1, 1794, as it is a claim upon the United States for services.

A claim for a revolutionary land-warrant must be presented to the Secretary of the Interior, and not to this court.

A claim on the United States for the pension due a decedent must be prosecuted by the administrator, and not by the heirs, as it is personal estate.

WOOLEY *v.* UNITED STATES.

Court martial — Decision on number and rank of members.

The officer who orders a court martial being necessarily obliged to decide whether thirteen officers can be convened without injury to the service, and also whether the appointment thereon of officers of inferior rank can be avoided, his decision is conclusive on both points.

If it be competent for the President of the United States to revise such decision, yet if the objection be not taken, his approval of the proceedings is like the judgment of a court of the last resort, final and conclusive.

Richardson *v.* United States.

An act of Congress acknowledging and reviving a claim against the United States barred by a statute of limitation, but containing a proviso that no more than a certain sum should be paid, does not remove the bar of the statute except as to such sum.

In the years 1775 and 1776, James Bell of Chambly, in Lower Canada, rendered services and furnished supplies to the American army, then in Canada, under the proclamation of General Washington, which contained the following promises and statements: —

"I have detached Colonel Arnold into your country with a part of the army under my command. I have enjoined upon him and I am certain that he will consider himself, and act as in the country of his patrons and best friends. Necessaries and accommodations which you may furnish he will thankfully receive, and render their full value. I invite you, therefore, as friends and brethren, to provide him with such supplies as your country affords, and I pledge myself not only for your safety and security, but for ample compensation."

Mr. Bell's claim for supplies, &c., furnished under this proclamation, was barred by the resolution of July 23, 1787, which precluded from allowance all claims not presented within one year from its passage.

By the act of June 30, 1834, the officers of the treasury were directed to settle the accounts of James Bell upon equitable principles, the amount found due to be paid to the heirs at law, but the bill contained a proviso that the amount to be allowed the heirs should not exceed $5727.03.

By the Court. — There is no doubt that where a claim against the United States is barred by a statute of limitations, it may be revived like any other claim between individuals, by an act of Congress. But the same principles which are applicable in a case between private persons must govern the relations between an individual and the United States, and it is well settled that any condition or qualification which repels the inference of a promise will prevent an acknowledgment from taking a case out of the statute. The principle also on which part payment takes a case out of the statute is, that it admits a greater sum to be due, and if there be anything in a given case which negatives such admission, part payment will not have this effect. Now in the present case, although the act authorizes the payment of a certain sum, there is an express provision that no larger sum should be paid. It cannot be inferred that this sum was paid on account of a larger debt admitted to be due. The act is merely an acknowledgment that a certain sum is due, qualified by the assertion that no more is due than the sum specified. Neither the act nor the payment under it can be held to remove the bar except as to $5727.03.

JOHNSON *v.* UNITED STATES.

Damages for conversion of private property to public use.

Where an officer authorized to purchase property for public use (as wagons for the use of the army) converts such property to such use, the government is liable only for the value thereof as for goods sold and delivered. For the damages sustained by reason of the conversion the only remedy is against the wrongdoer.

JEWETT *v.* UNITED STATES.

Resolution of 1776 — *Bounty land.*

The resolution of September 16, 1776, which grants bounty land "to the representatives of such officers and soldiers as shall be slain by the enemy," does not apply to the case of any one killed before its passage.

This court cannot take jurisdiction of any claim for bounty land until it appears that application has been made and refused at the proper department.

MYERLE *v.* UNITED STATES.

Government not bound by promise of indemnity to experimenters.

Under the act of March 3, 1809, the secretary of the navy has no power to bind the government by his promise to indemnify a citizen for his losses in making experiments in relation to the supplies for which the secretary might contract, although such experiments might result in a national benefit.

MUSY *v.* UNITED STATES.

Purchaser's oath — Estoppel.

Where an importer freely and without objection takes the "purchasers' oath" as to his goods, he is concluded thereby, and cannot be allowed afterwards to claim to have been the manufacturer thereof.

MC MCINTOSH *v.* UNITED STATES.

Officers performing duties of higher grade.

Officers temporarily performing the duties belonging to those of a higher grade shall receive the compensation allowed to such higher grade while actually so employed (4 Stat. at Large, 756).

But the mere discharge by an officer of the duties of a higher office than his own will not entitle him to the benefit of the statu

tory provision above referred to. To give him a claim to the salary of the higher office, the duties of that office must have been legally performed, that is, they must have been performed by virtue of an authorized acting appointment; and the burden of proof that they were so performed is on the officer making the claim.

Recent Cases in New York.

Supreme Court. First Judicial District. General Term. December, 1857.

Before MITCHELL, CLERKE and DAVIES, J.J.

[Reported *by* ELIAL F. HALL.]

BENMAN *v.* WRIGHT & D———.

Usury — Statute of limitations.

ACTION against the makers of a promissory note for $800, bearing date, Apalichicola, Florida, Oct. 11, 1841, and payable there, May 1, 1844, with 8 per cent. interest, that being the legal rate in Florida. The note was actually signed and delivered in the City of New York, to the payees, resident there, by the makers who were at that time residents of Florida. It was given for lands in Florida. The negotiations for the sale were conducted and concluded in Florida, between the defendants and the agent of the payees, though the agreement was finally perfected and executed in New York by the making and delivering of the note as aforesaid.

Held, that the note was not usurious. Where a personal contract by its terms is to be performed in another State, and the place of its performance is not chosen with any intention to evade our laws, but because that place best suits the honest intentions of the parties; our usury laws do not apply to it, although it be made and executed here. Of course, there would be a presumption of an interest to evade our laws, until some explanation should be made.

Held, further, in conformity to the opinions of McKissock, J., in *Burroughs* v. *Bloomer*, 5 Denio, 532; of Chancellor Walworth, in *Didier* v. *Davison*, 2 Barb. Ch. R. 477; and of Duer, J., in *Ford* v. *Babcock*, 2 Sand. S. C. R. 578; and adversely to the cases of

Dorr v. *Swartwout*, 5 N. Y. Legal Observer, 172; and *Cole* v. *Jessup*, 2 Barb. S. C. R. 309; that the exceptions in reference to absence from the State, in the latter part of § 27, Article 2, Title 2, Chap. iv, Part iii, of the Revised Statutes, is not limited in its application to the first absence after the cause of action occurred, but applies to successive absences.

Opinion by MITCHELL, J.

BENSON *v.* CROMWELL.

Power of county courts to foreclose mortgages.

The provision in the Code of Procedure which confers jurisdiction of the foreclosure of mortgages, upon county courts, is constitutional. The opposite conclusion does not follow necessarily from the decision of the court of appeals in the case of *Kundolf* v. *Thalheimer*, 2 Kernan, 593. The words "special cases" in § 16 of the article in the Constitution relating to the judiciary, is prospective and not retrospective in its application. It means cases which the legislature should specify. It does not appear that the reasoning of Gardiner and Hand, J.J., in *Kundolf* v. *Thalheimer*, was adopted by the other judges. For aught that appears, those judges put their decision, that the statute conferring jurisdiction on the county courts in actions of assault and battery is unconstitutional, on the ground that the legislature did not specify the cases in which the county courts were to have original civil jurisdicition, but gave it in general terms. But the Code does distinctly specify the power to foreclosure mortgages, in the title relating to county courts.

This is adverse to the decision in the second district, in the case of *Hall* v. *Nelson*, 23 Barb. S. C. R. 88.

Opinion by MITCHELL, J.

TALLMAN *v.* TURCK & ANOTHER.

Evidence — Demand before suit brought, when necessary.

Action for the recovery of goods received by the defendant from one Cromwell, who purchased them from the plaintiff under fraudulent representations which vitiated his title to them. On the trial, the defendant moved for a nonsuit, on the ground that no demand of the goods by the plaintiff before suit brought, had been proved.

Held, that the motion for a nonsuit was properly denied. A demand of the defendant in such a case is required to be proved, only after he has established that he purchased in good faith and for value. This was not done here. See *Ely* v. *Ehle*, 3 Comst. 506; also 3 Hill, 350; 20 Barb. 641; 2 Denio, 136; 1 Denio, 74; 2 Hill, 288; 8 Cowen, 238; 20 Barb. 501; 6 Hill, 613; 3 Wend. 406.

Opinion by MITCHELL, J.

FOWLER & LIVINGSTON *v.* DEPAU & OTHERS.

Contingent remainders limited on prior remainders.

Francis Depau, by his will made in 1833, after providing for his wife, gave his residuary real and personal estate, in equal portions, to his seven children for life, remainder to their issue respectively, the issue of each to take absolutely the one seventh in which their, his or her parent held only a life interest. The will then proceeds as follows: "and in case the issue of any or either of my children should die before attaining the age of twenty-one years, and without leaving any issue, him or her, surviving, then I direct the share or portion of the one so dying to go to his or her surviving brothers and sisters, in equal portions, or share and share alike, and the issue of such as may then be deceased, such issue taking the same share as his, her or their parent would have taken if living."

Held, that this clause created a contingent remainder in fee upon a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited, shall die under the age of twenty-one years, and is therefore expressly sanctioned by the 16th section of 1 R. S., 723.

After the above quotation, the will continues as follows: "and should either of my said children die without leaving issue, at the time of such death, surviving, then the remainder of the estate, both real and personal, hereby allotted to such child so dying, shall fall into and constitute part and parcel of the residue of my estate, and belong to the surviving brothers and sisters and their issue, in the manner and proportion herein already specified."

Held, that by this clause, the power of alienation would be suspended as to one seventh, first, during the life of the testator's child; next, a separate one sixth part of said one seventh, would pass to each of the six surviving children of the testator for life, remainder in fee as to each separate $\frac{1}{42}$d part of the estate, to the issue of the said second taker for life, with a contingent remainder as to the same $\frac{1}{42}$d part, to the surviving brothers and sisters of any one of the issue dying under twenty-one years of age. The power of alienation then would be suspended as to each $\frac{1}{42}$d part during the life of the first taker of the one seventh, and during the life of the next taker for life, and then the remainder would vest in fee in the issue of the second taker for life, with a contingent remainder over in fee, to take effect in the event that the persons to whom the first remainder is limited should die under twenty-one years of age. This is expressly authorized by the statute above cited.

Again, the contingency contemplated by the clause of the will last quoted has not taken place, but the opposite contingency, viz., that of a child dying leaving issue has taken place, therefore,

Held, that even though the clause last quoted were void, as creating a limitation beyond the period allowed by statute, it would

not thereby render invalid that part of the will which provides for the contingency of children dying leaving issue. Where a devise over is limited to arise on an alternative event, one branch of which is within, and the other is not within the prescribed limits; the devise over will be valid or not according to the event. See Powell on Devises, Jarman's edition, vol. 2, p. 400–1.

Opinion by MITCHELL, J.

Alexander Hamilton, Jr., for plaintiffs.

Storrs and *Sedgwick*, for defendants.

THE PEOPLE *v.* PAIGE.

Construction of the liquor law of 1857.

The act of 1857, "An act to suppress intemperance," &c., (see Session Laws of 1857, c. 628,) contains no provision restricting the amount of bail to be taken from a defendant arrested after indictment found. The limitation to $100 in § 16 of this act, does not apply to such a case.

A person who is neither an inn, tavern or hotel keeper, nor a person licensed to sell liquors, is not prohibited by § 21 of this act from selling or giving away intoxicating liquors or wines on Sunday.

Offenders against this act, may be legally indicted by the grand jury, without first having been taken before a magistrate.

The word "present" in § 29, means to present by indictment.

Opinion by DAVIES, J.

New York Court of Appeals.

HIBBARD *v.* N. Y. & ERIE RAILROAD CO.

Railroad — Duty of passengers to show tickets.

The conductor had once been shown the plaintiff's ticket, and on asking to see it the second time, was assured by a third person that the plaintiff had paid his fare. The plaintiff persisting in his refusal to exhibit his ticket, was ejected from the cars.

It was held, 1. That it is lawful for a railroad company to require that persons engaging passage in its cars should show their tickets whenever required by the conductor, on pain of being left to travel the remaining distance in some other way in case of refusal. 2. By the purchase of a ticket, a passenger agrees to conform to all reasonable regulations of the company. 3. Although a conductor may know that a passenger's fare has been paid, he has a right to see the ticket from time to time, in order to be assured that it is not passed over to another person, and thus made the instrument of carrying two persons instead of one.

Supreme Court of New Hampshire.

December Term, 1857. *Strafford.*

ATLANTIC INSURANCE CO. *v.* SANDERS.

Declaration — Demurrer — Nonsuit — By-laws — Assessments.

IT is a fatal variance if a note declared on as of a particular date proves not to have any date.

An omission to state in a declaration any time when the promise was made is bad on demurrer, but is not a ground of nonsuit.

The time when any traversable fact happened, is not material, unless it constitutes a material part of a contract declared on, or is the date of some written contract or record.

A breach assigned either less or larger than the contract, is bad on demurrer, but is not ground of nonsuit.

Private statutes and by-laws may be proved, though not set out in pleading where it is not necessary to state them as part of the cause of action.

Both may be proved by printed copies attached to the policy, where the evidence tends to show the policy accepted by the defendant.

Where the charter provides that all assessments shall be determined by the directors, and lays down the rules by which the amount to be raised and the manner it is to be apportioned are fixed, all that is necessary is that the directors by vote determine that an assessment be made, and such vote is a sufficient requirement of payment of the premium note.

Where a by-law requires notice of an assessment designating the class of property assessed to be published, a notice not specifying the amount payable on each note is sufficient.

It is immaterial in what manner the stated meetings of directors have been fixed. It is enough if they are in part held on stated days.

Assumpsit for money paid does not lie to recover a premium note.

December Term, 1857. *Cheshire.*

DICKINSON *v.* LOVELL.

Judiciary act of 1855.

The act of 1855, remodeling the judiciary, has not taken away the right of review in actions then pending.

GILSUM *v.* SULLIVAN.

Settlement of pauper.

An obligation held by a person to support him, his wife and minor children during life, and secured by a mortgage of real estate, although it may be found by a jury to be of a greater value than $250, is neither real nor personal estate within the meaning of the 4th clause of § 1, c. 65, Rev. Stat., which declares that any person of the age of twenty-one years having real estate of the value of $150, or personal estate of the value of $250, shall thereby gain a settlement.

December Term, 1857. *Sullivan.*

WILCOX *v.* BOWERS.

Construction of statute — Illegal fees — Penalty — Attorneys — Writ.

The penalty prescribed by statute for taking illegal fees, is incurred only when a public officer, or some person in his behalf, with his assent, demands and receives compensation for some service by him rendered in the discharge of his official duty, other or greater than the law approves therefor.

Attorneys, while receiving compensation in their offices for services rendered by them for their clients in matters preliminary to proceedings before a judicial tribunal, cannot be regarded as public officers demanding and receiving compensation for services rendered in the discharge of official duty.

The statute provision that only one dollar shall be allowed for a writ, including the blank, in bills of costs taxed in the superior court or court of common pleas, is not violated by an attorney's receiving a larger sum as his compensation for making a writ, while adjusting a suit for or with his client before the same has been entered in court.

JUDGE OF PROBATE *v.* CLAGGETT, ET AL.

Administration with will annexed — Bond — Administrator de bonis non.

A bond in the form usually given by the administrator of an intestate estate, and containing all the provisions of the statute applicable to an administrator of such estate, is valid and sufficient to bind an administrator with the will annexed, to the faithful discharge of his official duties, when given by him as a condition of his appointment to that office.

The provision in such bond that the obligor shall administer the estate of the deceased according to law, is in effect a provision

that he shall administer the same according to the will of the testator; such will having been previously duly proved and approved by the proper authority.

The administrator *de bonis non* with the will annexed of a deceased testator, is the proper person to prosecute, in the name of the judge of probate, a suit against the sureties in such bond, to recover the balance found remaining in the hands of the first administrator upon the settlement of his final account of administration, provided the necessary preliminary steps have been taken, and the proper proceedings had to authorize such suit.

December Term, 1857. *Belknap.*

Eastman *v.* Town of Meredith.

Action.

If a town erect a building for a town house, and the building is so carelessly and improperly constructed by those who build it in behalf of the town, that the flooring gives way at an annual town meeting, and an inhabitant and legal voter in attendance at the meeting receives thereby a bodily injury, he cannot maintain an action against the town to recover damages for the injury.

Mason *v.* Thomas.

Distress by a surveyor of highways.

A surveyor of highways is justified by his warrant in taking a distress for non-payment of a tax, though his district, as limited in his warrant by the selectmen, includes a road or roads which are not public highways.

It is not necessary that the place at which a tax payer has notice to attend for the purpose of working out his tax should be directly on any highway in the district.

If a distress is taken for a highway tax on Monday, the four days, which the law requires it to be kept before notice of sale, will extend to the Saturday following, and notice given on Saturday will be legal and regular.

And notice given on Saturday of a sale on the Monday following will be legal and regular.

Gilman & Sanborn *v.* Hill.

Sale and delivery of chattels — Statute of frauds — Confusion of goods — conversion in trover.

If a sale of goods consist of a number of articles at the same

time, neither of which is of the price of $33, but which in goods exceed that sum, the contract is deemed to be entire, and to fall within the statute of frauds.

To take a case out of the statute of frauds, acceptance and actual receipt by the buyer of goods verbally bargained for must be shown.

If upon a sale of chattels any thing remain to be done, as between the vendor and vendee, before the goods are to be delivered, a present right of property does not attach in the vendee. And where the sale is by number, weight or measure, it is incomplete until the specific property is separated and identified.

In trover the general rule is, that assuming to one's self the property and right of disposing of another man's goods is a conversion.

An officer who has a writ against a party whose goods are mixed with a third person, does not make himself liable as a trespasser by the mere act of attaching the whole.

The defendant, who was an officer, having a writ against one G., on the 22d day of August, attached property of his which was intermixed with similar property of the plaintiffs. On the same day, after the attachment, he was informed of the plaintiffs' claim, but subsequently removed the whole property without making any inquiry as to the interest of the plaintiffs, or attempting to separate the goods. On the 31st day of August, the plaintiffs commenced an action of trover against the defendant. In November following, the defendant advertised and sold the whole property as the property of G.

Held, that the evidence was competent to show a conversion without showing a demand and refusal.

Page *v.* Marsh.

Apprenticeship — Implied contract.

A contract of apprenticeship, not conformable to the statute, is voidable only by the apprentice, and cannot be avoided by any other person or party, for that reason.

If the apprentice fulfil the stipulations of such contract, he will be entitled to all the benefits accruing to himself by its terms.

Where a father binds his minor son as an apprentice by a contract not in conformity to the provisions of the statute; after such contract has been avoided by the son, the law will not imply a promise by the master to pay the father for the services of the son during a portion of the apprenticeship, if by the terms of the contract nothing is to be paid him for such services during the whole period thereof.

December Term, 1857. *Carroll.*

BANFIELD *v.* PARKER.

Res gestæ.

Where the question before the jury is the good faith of a sale of goods, whatever is said in the progress of the negotiations and contemporaneous with the sale, and having a tendency to give a character to it, and which derive credit from it, is admissible.

But a recital of past transactions is not admissible; and where the sale had been completed, and one of the parties during the afternoon of the day of the sale, at another place, stated to other persons what had been done: *Held*, that the statements were inadmissible.

BARKER & WIFE *v.* COBB.

Conditional deed — Effect of divorce upon husband's rights in wife's real estate.

A deed with a condition written upon the back, and executed by the grantee, is a conveyance upon condition, if there be nothing in the instrument or condition indicating to the contrary.

By a deed upon condition, though an estate be conveyed, yet it passes to the grantee subject to the condition, and laches are chargeable upon the grantee for non-performance of the condition annexed to the estate, even though such grantee be a *feme covert.*

He who enters upon land for condition broken, becomes seised of his first estate, and thereby avoids all intermediate charges and incumbrances.

A divorce does not *ipso facto* cut off the rights of the husband in the real estate of the wife. It requires the decree of the court granting the divorce to disencumber the estate from the husband's rights.

DREW *v.* RUST.

Mortgage — Quit claim — Void as to creditors — Mortgage, after payment regarded as subsisting.

A quit claim deed without consideration from a mortgagor to the mortgagee, will be without effect as against an attaching creditor of the mortgagor.

If a mortgagee after such quit claim deed, purchase the claim of a creditor, and cause the right in equity to be levied upon and sold, he cannot set up his quit claim against the purchaser.

If a party who has a right to require an assignment, pay the mortgage debt, and take a discharge, the mortgage will be held a subsisting security for his protection.

If necessary to prevent the loss of the money so paid, he may maintain a writ of entry as on a mortgage, and recover a conditional judgment for that amount.

Whitton *v.* Whitton.

Partition — Right of possession — Multifariousness.

A bill in equity lies for partition. Where a conveyance by deed is alleged in a bill, it is not necessary to aver that the deed was delivered.

To maintain a proceeding for partition, the applicant must show a present right of possession. It is not enough that he shows a right of entry for condition broken.

If a bill is brought against several for partition, and also to set aside a deed, or compel a reconveyance against one, it will be multifarious, the other defendants having no interest in the deed or reconveyance.

Fowler *v.* Grant.

Bill in equity for relief against a conveyance upon condition.

The remedy of the grantor of land in a conveyance upon condition subsequent which has been broken, is perfect and adequate at law for the recovery of the land by a writ of entry, and chancery will afford no relief upon a bill praying that he may be restored to the possession: nor is the complainant entitled to a decree to be permitted to redeem the land from a mortgage given by his grantor to a third person, against which he may be unable to enforce his title in a suit at law by reason of his having so conducted, in reference to the giving of the mortgage, as to be estopped to set up his title against it, unless the case be so stated in the bill as to show that he is thus estopped, and this be set forth as the ground for seeking relief by a decree to redeem.

Semble, upon a case thus stated he would be entitled to redeem, unless there had been a foreclosure of the mortgage.

Garland *v.* Rollins.

Division of lands by original proprietors of townships — Plans.

By a vote of the original proprietors of a township, a committee was appointed "to run out all the common lands, showing all the lands that have been pitched, and all the common land that is left,"

and authorizing the committee "to lay out by metes and bounds to each person that has made his pitch one hundred acres to each right, and to make return accordingly." The only return made by the committee of their doings was a plan or map of the township, showing all the lots and pitches and the common land left, and the proprietors voted to accept the report of the committee. One of the original proprietors who had made his pitch, had conveyed, previously to the appointment of the committee, one third of his right to J. H., and two thirds to A. W. The plan represented the lot assigned to the right of the proprietor as lying in one body, and with "J. H., $33\frac{1}{3}$ acres" written on the east part of the lot, and "A. W. $66\frac{2}{3}$ acres" on the west part. There was in fact a pond of water covering about twenty acres, extending through the middle of the lot, and the quantity of land between the margin of the pond and the outside lines of the lot on the east and west respectively, was sufficient to give to the grantees of the original proprietor their several proportions of the one hundred acres, without including any portion of the pond.

Held, that parol evidence was inadmissible to show that the committee intended to assign to the right of the proprietor the two separate parcels, one on the east side of the pond containing $33\frac{1}{3}$ acres, and the other on the west containing $66\frac{2}{3}$ acres, constituting together the one hundred acres allotted to his right, that the plan was the proper record evidence of the allotment which could not be contradicted or varied by parol, and that the entire lot within the outside boundaries as delineated on the plan, including the pond, was assigned to the right.

State v. Gary et al.

Indictment — Caption — Uncertainty — Arrest of judgment.

The caption is no part of an indictment; its officer is to state the style of the court at which, and the time and place when and where it was found, with reasonable certainty.

A caption of an indictment, alleging that it was found at a particular term of the supreme judicial court, is not defective or imperfect; inasmuch as the terms of the court are fixed by public law, and when the time is stated, with the time and place of holding it, it is sufficiently stated, and sufficiently appears, with reasonable certainty, whether the indictment was found at a trial or law term of that court.

In every indictment the offence should be so described as not to leave it uncertain what the government really rely upon to support the accusation before trial, what they have relied upon after trial, or for what a conviction has been had, if one be obtained.

An indictment charging the respondents with having conspired among themselves falsely and maliciously to charge or cause to be

charged, and with having falsely and maliciously prosecuted or caused to be prosecuted a certain person for a certain crime, is bad for uncertainty, and judgment thereon will be arrested upon motion.

December Term, 1857. *Grafton.*

Town of Groton *v.* Haines.

Highway laid out over an artificial watercourse.

If the owner of land, over which a highway is laid out, have on the land an artificial watercourse used to convey water to his house, the road ought to be constructed and maintained with a culvert or other suitable passage for the water to run in the watercourse, unless the difficulty and expense of providing a passage for the water so exceed the damage, which would be caused by stopping the watercourse, as to make it unreasonable to require the road to be so constructed and maintained.

If the owner of land have a watercourse, and have a right to a culvert in a highway to convey the water in the watercourse, and the watercourse is obstructed by neglect of the town to keep it in proper repair, the owner, after due notice to the surveyor of the district, may himself open the watercourse, doing no unnecessary injury to the road.

Foster's Appeal.

Allowance to widow by judge of probate.

An allowance made by the judge of probate to a widow for her "present support," under § 1, c. 165, Rev. Stat., is not a gift to the widow, nor intended to remedy any apparent injustice to which she may be exposed by the statute of distributions on the will of her husband, but to enable her to support herself until her interest in the estate can be set out to her.

Where the inventory of the estate of an intestate consisted of real estate to the amount of $800, and personal to the amount of $1250, and the debts against the estate amounted to $575, and there were no lineal descendants, and the judge of probate made an allowance to the widow of $600; *held*, that the decree should be reversed, and an allowance of $250 be made.

Crosby et al *v.* Hanover.

Highways across the Connecticut — Eminent domain — Assessment of damages — Jurisdiction of common pleas.

The court of common pleas have jurisdiction of petitions for highways in towns bordering upon adjacent states, where the petitions have been presented to the selectmen of such towns and refused by them. The fact that the highway is only a part of one which may be or has been made in the adjoining State, does not affect the question of jurisdiction.

In the exercise of the power of eminent domain, a part or the whole of the franchise and property of corporations, however exclusive or ancient the grants, may be taken for the public use, upon suitable compensation being made therefor.

A bridge is a highway, and upon a petition for the same, a road may be laid out, the termini of which are the banks of a river.

Neither the selectmen or commissioners have any power to condemn property to public uses, which is situated in another State.

In the laying out of a highway the line of a State is, in law, a good terminus.

Where the commissioners of the county laid out a highway commencing at a terminus in the town of H., which lay upon the Connecticut river, and run across the river to the line of the State of Vermont, and in assessing damages, took and condemned the franchise and property of a bridge corporation within the limits of the highway, without taking the entire franchise and property ; and also condemned a pier and abutment of a bridge belonging to the corporation, and declared by them to be in Vermont; *held,* the report to be good, except in the condemnation of the pier and abutment in Vermont.

Hartwell *v.* Harris.

Costs on appeal.

On appeal from a justice of the peace, the plaintiff, if he recovers a judgment, is entitled to full costs, though the amount recovered in the court above may be less than was recovered before the justice.

Oxford *v.* Burton.

Settlement of paupers.

A settlement of a pauper will not be gained by the possession of property and the payment of taxes upon it, unless it is shown that

the pauper was possessed of real estate of the value of $150 for the term of four years, or was possessed of personal estate of the value of $250 for the same term, and in either case paid all taxes assessed on his poll and estate for said term. It is not enough that he was possessed of sufficient real estate for a part of the term and of sufficient personal estate for the residue of the term.

Screaton & Hand *v.* Downing.

Indorsement of writs.

The indorsement of a writ in a case where there are two plaintiffs, one of whom is a citizen of the State, and the other is not, is sufficient if made by any party and in any form which would render it sufficient if both plaintiffs were inhabitants of the State.

If a writ is not indorsed in the manner required by the statute, and this appears upon an inspection of the writ, it may be quashed on motion. If any fact is necessary to make the indorsement insufficient, which does not appear upon the writ itself, it must be set forth by plea.

Gay *v.* Smith.

Damage on reversal of judgment in error.

Upon the reversal of a judgment on error and a writ of restitution, there can be no inquiry of damages arising from the levy of the execution which issued on the erroneous judgment, and a sale thereon of the property of the judgment debtor.

The restitution can extend only to the amount received by the judgment creditor in satisfaction of the judgment.

Horn *v.* Atlantic and St. Lawrence Railroad.

Farm crossings, and cattle passes over railroad.

The owner of land over which a railroad is constructed, has no right of action against the corporation for damages resulting from the want of necessary farm crossings and cattle passes, unless it appears that the corporation have agreed to provide them, or that the land-owner has made application to three justices of the peace, and obtained their report determining where and within what time such crossings and passes shall be made agreeably to the provisions of § 5, c. 593, statutes of 1850.

WARREN *v.* GLYNN.

County paupers — Liability of towns — Bastardy.

The town, wherein a female, liable to become a county pauper, dwells and has her home, is liable by law for maintenance in the first instance of her illegitimate child, within the meaning of the 5th, 7th, 8th and 9th sections of the 68th chapter of the Revised Statutes.

If the mother neglect or refuse to prosecute, such town may rightfully institute and carry on proceedings against the putative father, for the purpose of obtaining indemnity against liability for the maintenance of such child.

December Term, 1857. *Coos.*

SUMNER ET AL *v.* PARKER.

Independent covenants — Rescinding of contracts.

Where there are several covenants, promises or agreements which are independent of each other, one party may bring an action for a breach without averring or proving performance on his part, and it is no excuse for the defendant to allege in his plea a breach on the part of the plaintiff.

A party who would rescind a contract on the ground that the other party has refused to perform a substantial part of his agreement, must do so distinctly and unequivocally. He cannot treat the contract as binding and rescinded at the same time.

STALBIRD *v.* BEATTEE.

Appeal — Auditor's report — Evidence.

An appeal vacates the judgment, but leaves the pleadings and evidence unaffected.

The statute makes an auditor's report competent evidence for the party in whose favor it is made, subject to impeachment, and an appeal can no more destroy such report, than any other evidence upon which the party is entitled to rely.

Supreme Judicial Court of Massachusetts.

Cases decided at the sittings in Boston in January and February, 1858.

Hampshire, Franklin and Hampden.

Mack *v.* Parks.

Attachment of chattel on the person.

An officer to whom a debtor hands his watch, merely to be looked at, while still attached to his neck by a silk guard, has no right to take the watch on a writ of attachment against the debtor, by severing the guard, without the debtor's consent, and is liable in trespass if he does.

D. Granger, for plaintiff.

A. M. Copeland, for defendant.

Inhabitants of Pelham *v.* Aldrich.

Voluntary conveyance.

A voluntary conveyance, made in good faith by a plaintiff pending a suit, is valid as against a judgment and execution subsequently recovered by the defendant for costs.

C. Delano, for demandants.

I. F. Conkey, for tenants.

Woodward *v.* Picket.

Trespass by mortgagee not in possession.

A mortgagee not in possession cannot maintain trespass against a railroad corporation, who own the equity of redemption, for cutting grass on land taken and used for their road.

A. Brainard, for plaintiff.

C. Allen, for defendant.

Chapin *v.* Universalist Society in Chicopee.

Construction of deed to trustees — Rights of cestuis que trustent.

A deed of land, in consideration of a sum paid by a mechanic association, made to five individuals, "trustees of said association, in trust for the stockholders of said association, their heirs and assigns," *habendum* "to the said stockholders, their heirs and assigns," vests a fee in the trustees. And a conveyance by less than all the trustees, of their aliquot parts, is void. Nor can a por-

tion of the *cestuis que trustent* maintain a writ of entry against the trustees and the remaining *cestuis que trustent* for the land.

J. Wells, for plaintiff.

H. Vose, for defendant.

CHAPIN *v.* VERMONT AND MASSACHUSETTS RAILROAD CORPORATION.

Action by bearer on bond made by railroad corporation.

On a bond issued by a railroad corporation, before the passage of St. 1852, c. 76, payable to ———, and not in terms negotiable, any person into whose hands it has come before the blank is filled, may maintain an action in his own name against the corporation.

A. L. Soule, for plaintiff.

H. C. Hutchins, for defendant.

Middlesex County.

PARKER *v.* EAGLE FIRE INSURANCE COMPANY.

Fire insurance — Damages where underwriters insufficiently repair.

Under a policy of insurance which stipulates that "the company shall have the right to make good the damage by rebuilding, replacing, or repairs;" if the defendants repair a loss by fire, but not so fully as to make the building as good as it was before, the plaintiff is entitled to recover of them only so much as is necessary to make the repairs complete.

B. F. Butler, for plaintiff.

I. W. Beard, for defendant.

POND *v.* JOHNSON.

Demand of dower.

A demand of dower in land held by two persons in severalty, will not support an action against either for dower in his portion of the land.

B. F. Butler, for defendant.

C. R. Train, for tenant.

COMMONWEALTH *v.* KELLEY.

Statute bond with condition not authorized by the statute.

A bond required by the court, under St. 1852, c. 322, § 7, of a party convicted of an unlawful sale of intoxicating liquors, and conditioned not to violate for a year any law concerning "the manufacture or sale" of such liquors, the statute only authorizing a bond not to violate any law concerning the *sale* of liquors, is void.

I. S. Morse, (district attorney,) for Commonwealth.

D. S. Richardson, for defendant.

COMMONWEALTH *v.* HALL.

Fugitive from justice — Warrant by governor — Habeas corpus from police court.

Under the Constitution of the United States, and Rev. Sts. c. 142, § 7, a warrant issued by the governor, authorizing the agent of another State to take and transport to the line of this State a fugitive from justice in that State, is a conclusive justification to such agent for arresting such fugitive, although the warrant does not on its face purport to have been issued with the advice of the council. And an indictment, under Rev. St. c. 125, § 20, for kidnapping, cannot be maintained against such agent by proof that the fugitive had been previously arrested by a civil officer of this State, authorized only to afford needful assistance in the execution of such warrant.

Under St. 1855, c. 489, §§ 3 and 21, a police court cannot issue a writ of *habeas corpus* for a person arrested here as a fugitive from justice in another State.

S. H. Phillips, (attorney general,) for the Commonwealth.

C. Cushing and *S. Webster*, for defendant.

BLOOD *v.* FRENCH.

Auctioneer has no authority to warrant.

An auctioneer selling personal property has no implied authority to warrant the quality of the property.

A. P. Bonney, for plaintiff.

A. R. Brown, for defendant.

JOHNSON *v.* WYMAN.

Discontinuance of highway.

It does not necessarily follow from the alteration of the line of a highway, that the former line has been discontinued, and in the absence of any record of the discontinuance, the question whether it was discontinued is for the jury.

J. Q. A. Griffin, for plaintiff.

B. F. Butler and *L. Marrett*, for defendant.

FRENCH *v.* HASKINS.

Assignment of part of a mortgage.

An assignment of so much of a mortgage of personal property as will secure a certain sum, less than the mortgage debt, is too indefinite to give the assignee of the mortgage such title to any part of the property as to enable him to maintain an action against a wrongdoer.

M. G. Cobb, for plaintiff.

B. Dean, for defendant.

PATTERSON *v.* GOLDSMITH.

Recognizance — Must be sued in court appealed to.

A suit on a recognizance to prosecute an appeal must be brought in the court to which the appeal was taken, and into which the recognizance was returned.

A. V. Lynde, for plaintiff.

J. M. Randall, for defendant.

FRAMINGHAM BANK *v.* GAY.

Practice act — Denial of signature.

In an action declaring on a note of hand, under the practice act, the signature of the note is to be deemed admitted, unless specifically denied in the answer.

C. R. Train, for plaintiff.

E. Ripley and *F. W. Pelton*, for defendant.

BANGS *v.* WATSON.

Judgment on debt for necessaries barred by certificate in insolvency.

A judgment on a debt for necessaries is barred by a certificate of discharge in subsequent proceedings in insolvency, although the original debt would not be barred.

A. F. L. Norris, for plaintiff.

A. R. Brown, for defendant.

BENNETT *v.* RYAN.

Parol evidence to contradict deed.

In an action upon a note given for the purchase of land, the defendant cannot introduce evidence to show that the deed, by which the land was conveyed, described a less quantity than had been previously stipulated.

A. R. Brown, for plaintiff.

B. F. Butler, for defendant.

LELAND *v.* ADAMS.

Devise in fee.

A testator devised as follows: "To his Excellency John Quincy Adams, one of my executors, I give and devise all my lands in Weston, in the county of Middlesex, with the privileges and appurtenances to the same belonging, containing four hundred acres, be the same more or less. This estate was formerly the property of Lieutenant Governor Gill, and I now devise it, as a token of my respect for the devisee, and in consideration of his services in directing the education of my two grandsons, Ward Nicholas and Thomas, sons of John Lane Boylston." *Held*, that the devisee took an estate in fee, there being no other clause or passage in the will to oppose this construction.

E. R. Hoar and *W. Dwight*, for plaintiff.

F. E. Parker, for defendant.

LANE *v.* BRYANT.

Admission of servant as part of res gestæ.

In an action to recover for damages sustained in a collision between the defendant's and plaintiff's carriages, evidence that the defendant's servant, at the time of the accident, and while the defendant was being extricated from the carriage, and while the crowd were about, said that the plaintiff was not to blame for what had occurred, is not admissible in the plaintiff's favor.

J. Q. A. Griffin, for plaintiff; *M. G. Cobb*, for defendant.

CHAPIN *v.* INHABITANTS OF MARLBOROUGH.

Evidence in action for defect of highway.

In an action against a town for injury caused by an alleged defect in the highway, caused by an accumulation of snow, evidence is not admissible on the part of the defendants to show that the road was put and kept in as good order as roads in the same and in adjacent towns are usually put and kept in like circum stances; nor that the road was actually in as good condition as that of other adjacent towns at that time.

Nor can the plaintiff, in such an action, give in evidence his own statements to his physician as to the cause of the injury for which the physician was consulted.

C. R. Train, for plaintiff; *J. Q. A. Griffin*, for defendant.

Plymouth and Bristol Counties.

COMMONWEALTH *v.* ROGERS.

Attorney's fee under liquor law.

The attorney's fee provided to be paid "to the attorney who appears for the government" when a fine is imposed under Stat. 1855, c. 215, § 15, is to be paid to the attorney who conducted the prosecution before the justice of the peace and not to the district attorney who prosecuted the case in the court of common pleas on appeal.

C. I. Reed, for the attorney before the justice.

L. F. Brigham, (district attorney,) contra.

HUTCHINS *v.* BYRNES.

Execution of deed by corporation — Forclosure of mortgage.

A deed of judgment by a corporation of a mortgage of real estate, concluding thus: "In witness whereof the said B. C. S. Bank by J. S. their treasurer duly authorized for this purpose, have hereunto set their name and seal." Signed, "J. S., Treasurer B. C. S. Bank," and sealed, is duly signed on behalf of the corporation.

One mortgage to husband and wife and another to the wife alone, cannot be foreclosed in the same writ of entry.

E. H. Bennett, for plaintiff; *B. Sanford*, for defendant.

CARNOE *v.* INHABITANTS OF FREETOWN.

Domicil.

The plaintiff and his wife were both born in Freetown, but had removed to and lived in Providence for many years prior to 1854. In that year the plaintiff and his family moved again to Freetown, but the plaintiff intended to return to Providence in the course of a few months. In April, 1855, however, the plaintiff made arrangements to reside permanently in Cumberland, in Rhode Island, and hired a house there and contracted to have his furniture removed there as soon as possible; but the furniture was not actually removed until the first day of May, nor did the plaintiff's family leave Freetown until some days after that time. *Held*, that the plaintiff was domiciled in Freetown on the first of May, 1855. He was not domiciled in Providence, because he had abandoned his intention of returning there; nor in Cumberland, because he had not actually removed thither.

C. I. Reed, for plaintiff; *B. Sanford*, for defendants.

HAYDEN *v.* SNELL.

Promissory note.

On a note promising to pay "J. S. or his wife A. S., the sum of eight dollars yearly during their natural lives," the wife may sue after the death of the husband.

E. Ames, for plaintiff; *J. Brown*, for defendant.

REARDON *v.* RUSSELL.

Bastardy process.

It is no ground for dismissing a bastardy process in the court of common pleas, that the attorney who appears there for the complainant, is the justice before whom the sworn accusation was made.

J. Brown, for defendant; no appearance for complainant.

BENT *v.* COBB.

Memorandum of sale under statute of frauds.

A guardian selling property of his ward by license of the probate court, and himself acting as auctioneer, cannot sign the memorandum in writing in behalf of the purchaser within the statute of frauds.

J. H. Andrew, for plaintiff; *E. Ames*, for defendant.

CLARK *v.* PACKARD.

Devise of land or its proceeds.

Under a devise of one third part of a farm to a daughter of the testator, "or if said farm is sold, then one third part of the proceeds of sale of said farm," the devisee is entitled to one third part of the proceeds of the farm if sold by the testator in his lifetime; although the testator by a succeeding clause in the will gives

to another daughter one third part of the same farm, with only this additional provision, "if my executor shall think best to sell said farm, then I give her one third part of the proceeds of the sale."

J. White, for pl'ff; *A. L. Cushing* and *W. P. Field*, for def't.

MURPHY *v.* SPENCE.

Evidence in bastardy process.

Since the statutes making parties witnesses, the complainant in a bastardy process is a competent witness to all material facts, including the fact of her having accused the respondent in the time of her travail of being the father of her child.

D. U. Johnson, for complainant; *P. Simmons*, for respondent.

GURNEY *v.* HOWE.

Post-office register — Money sent by mail.

A register of letters received at a post-office, kept by a deputy postmaster, under the laws of the United States, is competent evidence to show that the letter was received at that post-office; and a mistake in the date of the receipt, as stated in the register, may be controlled by the evidence of the postmaster to the ordinary course of the mails.

Money transmitted by mail in payment of a debt, is at the risk of the debtor until it is received by the creditor, unless the latter by agreement, express or implied, assumes the risk of its transmission.

B. Sanford, for plaintiffs; *B. W. Harris*, for defendants.

INHABITANTS OF SOUTH SCITUATE *v.* INHABITANTS OF HANOVER.

Action.

Where the legislature appoint commissioners to run the line between two towns, and provide that the expense of running the line shall be paid by the two towns, one of the towns, which has never assented to any part of the proceedings, is not liable to an action for one half the amount of the expenses by the other town which has paid the whole.

S. J. Gordon, for plaintiff; *P. Simmons*, for defendants.

YOUNG *v.* INHABITANTS OF YARMOUTH.

Defect in highway.

A town is not liable to an action by a traveller on a highway for an injury occasioned by coming in contact with the post of an electric telegraph company, erected pursuant to the directions of the selectmen, under St. 1849, c. 93, § 3.

S. N. Small, for plaintiff; *D. U. Johnson*, for defendant.

GODDARD *v.* PERKINS.

Practice of court of common pleas — Exceptions.

Tort in the nature of trespass *quare clausum.* The defendant relied upon a right to enter the premises, and alleged that his entry was without unnecessary force. At the trial in the court of common pleas, at the suggestion of the presiding judge, the evidence was confined to the question of the right, "independent of damages," and when the case was closed, the judge ruled *pro formâ*, that without considering the question of damages, the plaintiff could not maintain his action. *Held*, in this court, that the trial was irregular, as not necessarily deciding the whole case, and without considering the exceptions, a new trial was ordered.

E. Wilkinson and *B. Sanford*, for plaintiff.

J. M. Keith and *S. J. Gordon*, for defendant.

WRIGHT *v.* MORSE.

Parol evidence to explain promissory note.

Where A. made a promissory note, payable to the order of P., and C. put his signature upon the back of the note at the time it was made: *Held*, in a suit against C. as promissor, that he could not introduce oral proof that his contract was intended to be conditional only, and that the condition had been performed on his part.

O. Prescott, for plaintiff; *E. L. Barney*, for defendants.

Norfolk County.

BATES *v.* EIGHTH SCHOOL DISTRICT IN WEYMOUTH.

School district tax.

A person who resides in one town, and owns a stock in trade in another town, where he carries on his trade and hires a shop, is not liable to be assessed in respect to such stock for money raised to build a school-house in the district in which he resides, notwithstanding Rev. Sts. c. 23, § 33, that "every inhabitant of a school district shall be taxed in the district in which he lives for all his personal estate;" for this clause is controlled by the general enactments on the subject of taxation, which render such stock liable only in the place where the trade is carried on.

J. J. Clarke, for plaintiff; *S. Wells*, for defendant.

RODGERS *v.* PARKER.

Boundaries by plan.

An owner of a large tract of land divided it into lots and sold several of the lots by public auction, by a plan which showed an open avenue upon which the lots were bounded; and the deeds also referred to the plan and bounded the lots upon the avenue. *Held*, that the purchaser of one of the lots was entitled as against the grantor and those holding title under or through him, to have

the avenue kept open to the extent of his lot, and, *it seems*, also through its whole extent as shown on the plan.

G. White, for plaintiff; *J. J. Gourgas*, for defendant.

Essex County.

Tyler *v.* Currier.

Statute lien on vessels.

Under St. 1855, c. 231, concerning liens on ships and vessels, the third section of which provides that the law may be enforced by petition to the court of common pleas "in the manner provided by the fourth and subsequent sections of the one hundred and seventeenth chapter of the Revised Statutes," a petition cannot be filed until the sum has remained unpaid sixty days after it was payable, as provided with respect to liens on buildings by Rev. Sts. c. 117, § 4.

O. P. Lord and *W. C. Endicott*, for petitioners.

C. T. Russell, for respondents.

Phillips *v.* Tudor.

Deed by tenant in common.

A deed by a tenant in common, purporting to convey "sixty-four rods, being part of the third lot in the fourth range laid out to Robert Potter," sixty-four rods being a greater proportion of the whole lot than the grantor was entitled to, passes no title, either in common or severalty.

G. W. Phillips and *O. P. Lord*, for plaintiff.

W. C. Endicott, for defendant.

Gurtin *v.* Fifth School District in Danvers.

School districts.

Under Sts. 1849, c. 206, and 1851, c. 303, a town cannot be re-districted in part, for the purpose of taxation for schools, within ten years after the enitre town has been districted for that purpose.

O. P. Lord, for plaintiff.

S. B. Ives, Jr. and *J. B. Peabody*, for defendant.

Bigelow, Adm'r. *v.* Poole.

Advancement.

A testator kept and left at his decease a little book expressed in the beginning to be a statement of "the moneys I have advanced to my children severally, and to which I shall give credit to any or each of them as they may pay me from time to time." The book was kept in the form of an account with each child; on the credit side of one account were these words, "went into chancery, but paid nothing." In fact that child, during the parent's lifetime, took the benefit of the insolvent law, and the father proved against his estate the amount with which he was charged in the book, and

assented to his discharge in insolvency. *Held*, that the sum so charged was not an advancement.

E. R. Hoar and *H. Gray, Jr.*, for appellant.

W. L. Brown, for appellee.

Anderson v. Brown.

Review.

Review will lie of a judgment of the court of common pleas affirming on complaint a judgment of a justice of the peace in a civil action, and when granted, opens the whole case.

J. A. Gillis, for plaintiff, in review.

J. H. Robinson, for defendants, in review.

Fuller v. Salem and Danvers Loan and Fund Association.

Right to withdraw from loan fund association.

One of the "articles of association" of a loan and fund association contained the following clause: "In case any member by reason of sickness, or removal, or through misfortune, is unable to continue the payment of his subscription to the society, he or she may give notice to the secretary of an intention to withdraw from the association; and in case the board of directors are satisfied as to the grounds of withdrawal, the whole amount of subscription paid by the party into the association shall be returned, with the exception of the entrance fee. Any person wishing to withdraw for the above reasons or otherwise, and who shall have been a member of the association two years, and be clear of the books, shall receive an interest of four per cent., and any member of more than three years standing, shall be entitled to an interest of five per cent. on the amount of funds paid by such member or members into the funds of the association." *Held*, that a person who had been a member for more than two years, and was free of the books, might withdraw, and was entitled to receive back the amount of his subscription and four per cent. interest, although his reasons for withdrawing were not satisfactory to the directors, and they refused to grant him leave to withdraw.

E. W. Kimball, for plaintiff; *J. A. Gillis*, for defendant.

McGregor v. Wait.

Evidence of admission — Production of papers.

Where husband and wife were seized in fee, in right of the wife, of land over which a right of way is alleged to exist, admissions made by either husband or wife in the absence of the other, cannot be given in evidence to support the alleged easement as against a subsequent grantor in fee of the husband and wife.

Where one of the parties to the suit was called as a witness, and on cross-examination said that he relied upon a certain deed in support of his case: *Held*, that he might be compelled to pro-

duce the deed, and that the same should be read to the jury, although not proved by the attesting witnesses.

O. P. Lord and *S. B. Ives, Jr.*, for plaintiff; *J. A. Gillis*, for defendant.

PEABODY *v.* COUNTY COMMISSIONERS OF ESSEX COUNTY.

Place of taxation of ships of partnership.

Under Rev. Stats. c. 7, § 13, and Stat. 1839, c. 139, § 2, the ships belonging to a partnership, and employed in their business, are properly taxable to the partners jointly in the city or town where their business is carried on, and not separately at their respective places of residence.

W. C. Endicott, for petitioner; *J. A. Gillis*, for respondent.

OSGOOD *v.* FERNALD. OSGOOD *v.* HOWE.

Jurisdiction of insolvency proceedings.

Upon the death of a commissioner of insolvency, before whom proceedings are pending in the settlement of the estate of an insolvent debtor, the jurisdiction under Stat. 1856, c. 284, §§ 2, 40, 41, vests in the court of insolvency, and not in the judge of probate.

W. C. Endicott, for petitioner.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Judge.
Abbott, Benjamin F. (*a*)	Melrose,	Jan. 29,	L. J. Fletcher.
Amory, Jonathan	West Roxbury,	" 5,	Francis Hilliard.
Bartlett, Bela N. (*b*)	Cambridge,	" 7,	L. J. Fletcher.
Bates, Phineas	Marlboro',	" 23,	L. J. Fletcher.
Brigham, Edward L.	Worcester,	" 18,	John J. Piper, Register.
Brown, Charles E (*b*)	Cambridge,	" 7,	L. J. Fletcher.
Carpenter, Sullivan L.	Roxbury,	" 12,	Francis Hilliard.
Carter, Frank	Cambridge,	" 5,	L. J. Fletcher.
Clapp, Wm. B. (*c*)	Charlestown,	" 15,	Isaac Ames.
Cleveland, E. C. (*d*)	Worcester,	" 5,	John J. Piper, Register.
Currier, Alpheus	Haverhill,	" 4,	Henry B. Fernald.
Daniels, Henry M. (*e*)	Enfield,	" 5,	Horace I. Hodges.
Demerest, Samuel C. (*f*)	Boston,	" 9,	L. J. Fletcher.
Dexter, Freeman	North Bridgewater,	" 21,	David Perkins.
Doane, Elisha	Boston,	" 29,	Isaac Ames.
Duffee, Francis (*g*)	Boston,	" 7,	Isaac Ames.
Dwight, Edmund, Eliot, Samuel A. (*h*)	Boston,	" 9,	Isaac Ames.
Farnum, Charles G.	West Roxbury,	" 7,	Isaac Ames.
Fiske, George A. (*i*)	Roxbury,	" 7,	Isaac Ames.
Flanga, John (*j*)	Boston,	" 18,	Isaac Ames.
French, Abner, French, George P. (*f*)	Watertown, Boston,	" 9,	L. J. Fletcher.
Frink, Edward A.	Milford,	" 8,	John J. Piper, Register.
Garfield, Moses (*k*)	Newton,	" 19,	L. J. Fletcher.
Gay, Lewis H.	Boston,	" 14,	Isaac Ames.
George, John C., George, Lyman A. (*l*)	Boston,	" 16,	Isaac Ames.
Griffin, Luther E.	Boston,	" 25,	Isaac Ames.
Gustin, James H.	Milton,	" 15,	Francis Hilliard.
Hartnett, Michael (*g*)	Boston,	" 7,	Isaac Ames.
Hildreth, Edward S.	Dedham,	" 13,	Francis Hilliard.
Hinds, Wm. A. (*m*)	Boston,	" 14,	Isaac Ames.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Judge.
Hook, Moses	Haverhill,	Jan. 8,	Henry B. Fernald.
Hopkinson, John F. (c)	Charlestown,	" 15,	Isaac Ames.
Horn, Edwin B.	Boston,	" 26,	Isaac Ames.
Houghton, H. H. (d)	Worcester,	" 15,	John J. Piper, Register.
Jackson, Patrick T. (h)	Boston,	" 9,	Isaac Ames.
Jenkins, Henry T, (n)	New York,	" 8,	Isaac Ames.
Johnson, George L. (e)	Enfield,	" 5,	Horace I. Hodges.
Jones, Henry	South Reading,	" 21,	Isaac Ames
Junkins, John R. (o)	Stoneham,	" 21,	L. J. Fletcher.
Kendall, Samuel E.	Boston,	" 16,	Isaac Ames.
Kidder, Daniel T.	Cambridge,	" 13,	Isaac Ames.
Kitfield, Henry	Manchester,	" 13,	Henry B. Fernald.
Knights, Edward R. (a)	Melrose,	" 29,	L. J. Fletcher.
Lane, L. L. (o)	Stoneham,	" 21,	L. J. Fletcher.
Lawrence, Samuel (n)	Andover,	" 8,	Isaac Ames.
Leonard, Abel W.	Lowell,	" 19,	L. J. Fletcher.
Livermore, Josiah T.	Cambridge,	" 22,	L. J. Fletcher.
Loring, Henry (i)	Brookline,	" 7,	Isaac Ames.
Loring, W. H. H.	Hopkinton,	" 7,	L. J. Fletcher.
Lovewell, Charles B. (p)	Needham,	" 26,	Francis Hilliard.
Lyman, Geo. T. } (q) Lyman, Wm. P. }	Boston,	" 18,	Isaac Ames.
Mann, Geo. E.	Worcester,	" 15,	John J. Piper, Register.
Maynard, Edwin L. (r)	Boston,	" 15,	Isaac Ames.
Mills, Charles H. } (h) Mills, James K. }	Boston,	" 9,	Isaac Ames.
Morse, Henry	Natick,	" 21,	Isaac Ames.
Parkhurst, Nathaniel R.	Worcester,	" 23,	John J. Piper, Register.
Perry, Oliver H. (n)	Andover,	" 8,	Isaac Ames.
Porter, Edward P.	Boston,	" 18,	Isaac Ames.
Pratt, Lewis M } (s) Pratt, Solon W. }	Weymouth,	" 14,	Francis Hilliard.
Quimby, Wareham M. (j)	Boston,	" 18,	Isaac Ames.
Redfern, Wm. C.	Winchester,	" 27,	Isaac Ames.
Rice, Charles 2d (k)	Newton,	" 19,	L. J. Fletcher.
Roberts, Joseph (r)	Boston,	" 15,	Isaac Ames.
Rockwood, Mellin	Leicester,	" 20,	John J. Piper, Register.
Rosenfield, Charles W.	Boston,	" 27,	Isaac Ames.
Saunders, Wm. B.	Haverhill,	" 28,	Henry B. Fernald.
Shaw, Joel	Boston,	" 27,	Isaac Ames.
Slade, Jarvis } (n) Stone, Wm. W. }	Boston, New York,	" 8,	Isaac Ames.
Strickland, Geo. W.	Beverly,	" 4,	Henry B. Fernald.
Thacher, Barnabus } (t) Thacher, Wm. S. }	East Bridgewater, Boston,	" 4,	Isaac Ames.
Thayer, Alexander, (d)	Worcester,	" 15,	John J. Piper, Register.
Wade, Thomas S.	Greenfield,	" 21,	Horace I. Hodges.
Wagg, Joshua M.	Georgetown,	" 22,	Henry B. Fernald.
Walker, Peter H.	Somerville,	" 18,	Isaac Ames.
Ware, R. & P. C. (u)	Montague,	" 26,	Horace I. Hodges.
Walsh, Lydia M.	Boston,	" 12,	Isaac Ames.
Wells, Charles & Co. (v)	Conway,	" 8,	Horace I. Hodges.
Whitney, Eben'r (m)	Natick,	" 14,	Isaac Ames.
Woods, J. S.	Natick,	" 23,	L. J Fletcher.
Worsley, Pardon	Charlestown,	" 15,	L. J. Fletcher.

(a) Abbott & Knights.
(b) Bartlett & Brown.
(c) Hopkinson & Clapp.
(d) Thayer, Houghton & Co.
(e) Johnson & Daniels. "Individually and as copartners."
(f) Abner French & Co.
(g) Duffee & Hartnett.
(h) Charles H. Mills & Co.
(i) Loring, Fiske & Co.
(j) Quimby, Flangn & Co.
(k) Rice & Garfield.
(l) L. A. George & Co.
(m) Whitney & Hinds.
(n) Lawrence, Stone & Co.
(o) Lane & Junkins.
(p) "Doing business under the name of Charles B. Lovewell & Co."
(q) G. T. & W. P. Lyman.
(r) Roberts & Maynard.
(s) S. W. Pratt & Co.
(t) Thacher & Co.
(u) R. & P. C. Ware. "Individual names not given."
(v) Charles Wells & Co. "Individual names not given."